Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. ~~77~~-612

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COALS MINERS,
Respondents,

and

EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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No. ——

UNITED MINE WORKERS OF AMERICA,
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CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS,

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EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The Petitioner, United Mine Workers of America respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 28, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 556 F. 2d 190 and is appended to this petition as Appendix A (1a-47a).

The Memorandum and Order of the United States District Court for the Middle District of Pennsylvania are appended to this petition as Appendix B (48a-165a, 167a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The decision of the United States Court of Appeals was entered on April 28, 1977. A timely petition for rehearing *en banc* was denied on June 14, 1977. The time for filing this petition was extended by Mr. Justice Brennan from September 12, 1977 to and including October 27, 1977 by orders dated August 26, 1977 and September 27, 1977.

QUESTIONS PRESENTED

1. Do Sections 301 and 302 of the Labor-Management Relations Act mandate the federal courts to develop a body of federal common law under which to adjudge and remedy claims of negligence and breach of fiduciary duty regarding the administration of collectively-bargained pension funds?

a. Did the Court of Appeals err in holding—contrary to the decisions of other federal courts of appeals—that Section 302 of LMRA authorizes development of such a body of federal common law, that federal jurisdiction thereunder is not limited to the restraint of violations of the Section, and that Section 302 gives rise to an implied cause of action for damages?

b. Did the Court of Appeals err in holding, contrary to decisions of this Court and other federal courts of appeals, that Section 301 confers jurisdiction over

claims involving negligence and breach of fiduciary duty in the administration of a collectively-bargained pension fund which are not breaches of a collective bargaining agreement or other contract?

2. Did the Court of Appeals err in holding that the Union owed a duty of fair representation to retirees—non-bargaining unit members—in light of this Court's decisions creating and limiting the "duty" to bargaining unit members, and specifically, its decision in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), which unequivocally stated that because retirees were not employees within a bargaining unit represented by the Union, they were owed no such duty?

3. Did the Court of Appeals err in its threshhold determinations regarding the conditions under which liability might be assigned to a labor union under the federal labor laws for negligence of trustees in the governance of a collectively-bargained pension fund?

STATUTES INVOLVED

This case involves Sections 301 and 302 of the Labor-Management Relations Act, as amended, 61 Stat. 156, 29 U.S.C. 185 and 186. These provisions are appended as Appendix C (168a-174a).

STATEMENT OF THE CASE

A. *Background*

In this derivative litigation, beneficiaries of a collectively-bargained pension trust fund seek to hold their union liable for some $10 million in pension fund contributions plus interest owed contractually—not by the union—but by employers signatory to collective bargaining agreements under which the pension fund was established. Such a novel transferance of liability

is sought by them despite the Union's extension of close to $10 million dollars in loans—the greater portion of which have been forgiven—for the specific purpose of enabling the Fund to continue to make pension payments. The Court of Appeals' decision, resting in part on recognition of a new implied federal cause of action, constitutes a vast expansion of federal jurisdiction under the Labor-Management Relations Act and of the theories for imposition of liability thereunder so as amply to justify this Court's review under Rule 19.

Petitioner, the United Mine Workers of America (hereinafter "UMWA" or "Union"), is a labor organization whose members include active and retired coal miners throughout the coal-mining regions of the United States and Canada. The UMWA has been the collective bargaining representative of coal miners in the anthracite mining region of northeastern Pennsylvania for most of the twentieth century.[1]

Respondents are several retired anthracite miners receiving pensions from the Anthracite Health and Retirement Fund (hereinafter "Fund"). The Fund was created in 1946 through collective bargaining between the Union and anthracite mine operators signatory to the union contract and has been carried forward in successive collective bargaining agreements to date. Employer obligations to the Fund—out of which pensions are to be paid—are keyed to coal production.[2] Management of the Fund—including respon-

[1] The bulk of UMWA members are active and retired miners of bituminous coal. Active and retired miners of anthracite constitute approximately five per cent of the UMWA membership.

[2] The "royalty" payment, originally 5 cents per ton, was increased to 10 cents in 1947, 30 cents in 1950, 50 cents in 1952, and 70 cents in 1959 (51a-52a).

sibility for collection of royalty payments has, since the Funds's creation, been entrusted solely to a committee of three trustees.[3]

The Fund suffered severe economic difficulties almost from the onset incident to the displacement of anthracite as a space heating fuel by oil and natural gas and the consequent, unanticipated, virtual total collapse of the anthracite industry.[4] As production

[3] The composition of the trustees' committee, as found by the District Court (52a-53a) has been as follows. When the Fund was created in 1946, prior to enactment of the Labor-Management Relations Act of 1947, the collective bargaining agreement provided that two of the trustees would be designated by the Union and one by the operators. In an effort to comply with the equal representation requirement of Section 302 of LMRA, 29 U.S.C. 186, the 1948 Agreement provided that trustees would be chosen, one by the Union, one by the operators and one by joint appointment, "this joint appointee so chosen being equally the appointee of each of said parties . . . ." During the ensuing period—through 1967—the joint appointee was an individual who was also a member and officer of the Union. The 1966 Agreement provided that one trustee would be appointed by the Union, one by the operators, and the other would be a neutral person selected by the other two trustees; that Agreement further provided that the prior "neutral" trustee (the joint appointee) would remain as the "neutral" trustee. The person so designated remained until 1967, at which time he resigned, and a "neutral" with no UMWA affiliation was designated.

[4] The District Court's findings, in summary, sketched the magnitude of the collapse as follows: Whereas in 1947, the industry employed 80,000 miners who produced fifty-eight million tons of coal and had gross revenues of $413,000,000, by 1955, employment had dropped to 37,000 miners, production declined markedly to twenty-six million tons and gross revenues fell to $206,000,000. By 1965, the loss of demand had cut further into employment, production and sales; at that time, employment was down 85 percent from the post-War years to 12,000, while production was 14,000,000 tons—less than 20 percent of the 1947 figures. Total sales for the entire industry in 1965 were $97,000,000 (54a-55a).

plummetted and mines closed down, operator delinquencies to the Fund spiralled upward. The District Court found $2.5 million owed by 46 companies in 1954 and close to $12 million owed by 120 companies in 1962 (35a).[5]

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[5] District Judge Nealon, who not only scrutinized the voluminous record in this case, but witnessed these events firsthand, described the precipitous decline of the Industry and Fund income as follows:

> "To begin with, the market for Anthracite diminished drastically during the 1950s, total production declining precipitously during every year of the decade but 1956, when the market made a slight and shortlived recovery. This reduction in demand for Anthracite was caused primarily by competition from the natural gas and heating oil industries, as those fuels replaced coal as the primary sources of domestic heating fuels in this country. . . .
>
> At the same time that total production was declining as a result of competition from other industries, the Anthracite industry was being ravaged by intense competition within itself, as the existing companies sought to retain as much as possible of a rapidly shrinking market. The most obvious sign of this intra-industry competition was a steady drop in market price of Anthracite during the 1950s. . . . The most significant result of this competition, from the standpoint of the Fund at least, was the low profit margin which the operators maintained, as the companies sold their coal at or near cost in order to retain as much of the market as possible. . . .
>
> This meant that any non-production expenditure, such as the royalty payments to the Fund, the rate of which, incidentally, increased steadily during the decade, became more difficult to make under normal circumstances, and close to impossible to make in the event of unforeseen circumstances, such as disasters or sudden and dramatic drops in the market.
>
> Such unforeseen circumstances occurred regularly during the 1950s. The precipitous decline of the Anthracite market during those years has already been mentioned. Disasters seemed to hit the coal companies almost as frequently as market declines. The record is replete with examples of fires, floods and cave-ins which decimated some of the companies.

"Good times" never returned to the Industry nor to those dependent on it, including the Fund and its beneficiaries. Despite substantial negotiated increases in the amount of royalty to be paid per ton, royalty income to the Fund actually declined so that by the late 1960's, Fund income was approximately one-half what it had been in the mid-1950's (See Table at 165a). At the same time, bankruptcies and mine closures forced more and more miners into premature retirement. The pensioner population nearly doubled in the twenty years from 1949 to 1969, increasing from 7,000 to 13,000 (55a). The combination of an increased number of pensioners and a substantial decrease in revenues forced a sharp reduction in benefits and has threatened the cessation of pension payments altogether.[5a]

> As a result of these conditions, many operators ceased making royalty payments altogether, or made them only irregularly, as all costs were trimmed to the bone in an attempt to weather what was viewed as a passing market depression and temporary bad times; these operators were quick to plead their hard times as excuses for their failure to make payments to the Fund, and to promise full payment just as soon as the good times returned" (131a-133a).

[5a] The District Court described the reduction of benefits and the consequent emergence of Respondents as a protest group as follows:

> "The amount initially paid by the Fund to each increased sioner was $100 per month, and the death benefit payable to widows and orphans was $1,000. In 1954 these amounts were reduced to $50 and $500 respectively, and, in 1958, the pension was further reduced to $30 per month. After the pension had been temporarily increased to $50 per month, it was again reduced to $30 in 1961. No death benefits were paid during the years 1959-61, and none have been paid since 1964. It was following the 1961 reduction that the Panther Valley Protest Committee, a group of pensioned anthracite miners, was formed, and Charles Nedd, one of the plaintiffs in this case, was selected as Chairman of that committee" (54a).

It was in this context that the UMWA made nearly $10 million dollars of loans to the Fund out of the dues of its members at large—loans which have never been repaid and have in large part been forgiven—so that pension payments would not cease entirely. It was in this same context of collapse of the anthracite industry that Respondents—despite the Union's bestowal of vast sums out of its own resources—brought suit seeking to hold the Union answerable for failure of the employers to satisfy their contractual obligations.

B. *Procedural History*

Respondents sued originally in 1963 alleging that the Union had failed to carry out unspecified terms of the Anthracite Wage Agreement which, they claimed, obligated it to collect delinquent royalties owed by the mine operators to the Fund. The Complaint, predicated on diversity of citizenship, was dismissed for lack of jurisdiction, and the dismissal was thereafter affirmed.[6] On January 21, 1965, the present action was filed naming the Union as the sole defendant; jurisdiction was asserted under Section 301 of LMRA, 29 U.S.C. 185, again on the theory that the Union had breached a contractual duty to collect delinquent royalties. The Union made a motion for dismissal for lack of jurisdiction which the District Court denied. On an appeal under 28 U.S.C. 1292(b), the Third Circuit held § 301 jurisdiction lacking, declaring that the Union had made no contractual undertaking to collect royalties.[7] At the same time, the Court noted that

[6] *Nedd* v. *United Mine Workers*, 225 F. Supp. 750 (E.D. Pa., 1963), *aff'd.*, 332 F. 2d 373 (C.A. 3, 1964).

[7] *Nedd* v. *United Mine Workers*, 400 F. 2d 103, 105 (C.A. 3, 1968) ("Neither the original Complaint, the presently proposed amendments, nor anything submitted in briefs or arguments, points to any provision of the contract in which the Union obligates itself to enforce the operator's promise to contribute to the Fund, and our independent study of the contract has disclosed no such provision.").

Plaintiffs might have a cognizable claim for breach of the duty of fair representation, 400 F.2d at 105-106, and directed—should such a claim be pursued—that the Trustees be added as parties in order to receive any judgment on behalf of the Fund.

On January 23, 1969, Respondents filed an amended Complaint asserting breach of the duty of fair representation. The gravamen of their claim was that the Union—and the trustees under Union domination—had, out of a preference for the interests of active miners over those of retirees, purposefully refrained from taking vigorous action to collect employer delinquencies because they believed such action might put active miners out of work. Despite the Circuit Court's holding that the Union had no contractual obligations to collect royalties, the amended Complaint realleged Section 301 jurisdiction. Respondents also—for the first time—asserted federal jurisdiction under Section 302(e) of LMRA, 29 U.S.C. 186(e), and pendent jurisdiction of non-federal claims.[8]

The Union again sought dismissal for lack of jurisdiction. The District Court acknowledged the strength

[8] Section 302(e), by its terms, confers federal jurisdiction "to restrain violations" of Section 302. The Amended Complaint asserted the prior composition of the Trustees' Committee contrary to the equal representation requirement of Section 302(c)(5), 29 U.S.C. 186(c)(5), but did not seek injunctive relief to correct such condition or prevent its recurrence. As stated above, n. 3, any possible unequal representation had been corrected in 1967, two years before respondents' first assertion of jurisdiction under Section 302(e) at which time there was, therefore, no violation left to restrain.

of the asserted bases for dismissal, but indicated that —given the protracted history of the litigation—it would proceed to trial and address all issues thereafter. Thus, after a non-jury trial in July 1974, receipt of voluminous post-trial submissions and oral argument in June 1975, the District Court in April 1976, filed a substantial 121-page Memorandum and Order comprehensively detailing its findings and conclusions (48a-167a).

C. *The District Court's Memorandum and Order*

In summary, the District Court held federal jurisdiction lacking under each of the bases asserted by Respondents, and consequently, held pendent jurisdiction lacking as well. The District Court held that Respondents' fair representation claim, with its origin in the Third Circuit's 1968 *dictum*, had been foreclosed by this Court's 1971 decision in *Pittsburgh Plate Glass*, *supra* (88a-96a). It held jurisdiction of the Section 301 claim precluded by the Third Circuit's 1968 holding that the Union simply had no contractual duty to attempt to collect royalty payments (81a-88a). Further, it held that federal jurisdiction under Section 302(e) is limited to injunctive restraint of violations of the Section 302(c)(5) structural standards, and that as of the filing of the Amended Complaint there was no such violation in existence which the Court might restrain (73a-81a).

Seeking to resolve all pending issues, the District Court proceeded to address the merits of Respondents' claims, assuming *arguendo* the existence of jurisdiction. Respondents asserted that the Union—and the trustees under Union domination—had refrained from vigorous litigative action to collect delinquencies out of favoritism for the interests of working miners over those of retirees and a belief that such action would

put active miners out of work. The District Court rejected this—Respondents' central assertion—as a matter of fact. It did find that the trustees—acting in good faith—had been negligent in too long tolerating operator delinquencies and not sooner assuming a vigorous litigation posture (124a, *et. seq.*). But it found that the trustees had *not* purposely refrained from collecting operator delinquencies and that neither they nor the Union had favored the interests of working miners over those of present pension beneficiaries (117a-124a, 149a-150a). It acknowledged that the Union's involvement with the Fund had historically been close but specifically rejected Respondents' assertion that the Fund had been harmed thereby. Indeed, it found to the contrary:

> "The record discloses almost uninterrupted support and assistance of the Fund by the Union. It was due to the efforts of the Union at the bargaining table that the Fund was established in the first place and that royalty rate increases were negotiated on a regular basis. Moreover, the Union was the most active participant in the attempts that were made to enforce the operators' responsibilities to the Fund. It administered the notice of delinquency program and staged the few strikes that were called against delinquent operators; it was the driving force behind the intensive and forceful negotiations during the latter part of 1962 which resulted in the signing of letter agreements by many of the operators; and throughout the Fund's history, Union officials harangued and jawboned delinquent operators in an effort to make them comply with the agreement. See, e.g., the countless references in the record to phone calls and letters from Joseph Kershetsky, who was the president of District 9. Most illustra-

tive of the Union's good faith support of the Fund, though, are the large loans, most of which have been forgiven, which the Union has periodically made to the Fund to permit it to continue paying pensions to retired miners when, had it not been for the loans, the precarious financial position of the Fund would have forced a temporary suspension of pension payments. A total of $9,247,334 has been loaned over the years, of which all but $1,954,000 has been cancelled and forgiven." (151a)

Finally, the Court found that the Union's intent and motives were proper at all times and that it had buttressed its *bona fides* with nearly $10 million in loans to the Fund, much of which had been forgiven, extending from the 1950's through the 1970's: "More than any other factor, these loans refute Plaintiffs' contention that the Union has arbitrarily or in bad faith discriminated against the Fund and its beneficiaries" (151a). Accordingly, while the District Court found that past trustees had been negligent in handling the problem of delinquencies, it could find no basis for imputing liability to succeeding trustees or to the Union (147a, 158).

Moreover, the District Court found that even if the Union were liable, it would be entitled to deduct from any recovery against it an amount equal to the total sum—nearly $10 million—in unpaid loans it had made to the Fund since its creation (159a-163a).

D. *The Court of Appeals' Opinion*

On April 28, 1977, the Third Circuit entered an Opinion and Order of reversal and remanded the matter for further proceedings. The result reached by the Court of Appeals rests necessarily upon jurisdictional determinations which are—as shown below—absolu-

tely unprecedented as to each of the three federal claims, and which compel this Court's attention through the granting of this Petition. It also rests upon legal determinations regarding liability of the Union for the negligent breaches of trust found by the District Court to be assignable to the past trustees and the Union's right to a credit of amounts loaned to the Fund against any liability which might be assigned to it. Notably, the Court of Appeals did not purport to reject as "clearly erroneous" any of the District Court's findings. The District Court's findings—most significantly, its findings that the Union did not favor the interests of working miners over those of pensioners, and that the Fund was substantially benefitted rather than harmed by its close association with the Union—were at least purportedly accepted by the Court of Appeals, and should guide this Court in its approach to the issues presented by this Petition.

REASON FOR GRANTING THE WRIT

I. IN OPENING THE WAY FOR ESTABLISHMENT OF A FEDERAL COMMON LAW OF PENSION AND WELFARE TRUST FUND ADMINISTRATION, THE COURT OF APPEALS' DECISION CONTRADICTS A LONG-STANDING PATTERN OF INTERPRETATION BY THIS COURT AND THE COURTS OF APPEALS OF SECTIONS 301 AND 302 OF THE LABOR-MANAGEMENT RELATIONS ACT

Prior to the Court of Appeals' decision in this case, the Federal Courts had not been authorized to establish a body of federal common law pertaining to pension and welfare trust funds similar to that which has evolved as a result of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), governing collective bargaining agreements. This Court certainly has never declared any such mandate. Indeed, on the single occasion when it has spoken regarding the scope of federal jurisdiction to address questions relating to the

governance of collectively-bargained funds, it read that jurisdiction narrowly. Thus, in *Arroyo* v. *United States*, 359 U.S. 419, 427 (1959), this Court declared that "[t]he legislative history [of the Labor-Management Relations Act, Section 302(e)] is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." The stricture of *Arroyo* contrasts markedly with *Lincoln Mills*' mandate for judicial "inventiveness" in fashioning federal substantive and remedial law applicable in suits for enforcement of labor contracts under Section 301. Several Courts of Appeals have recognized—consistent with *Arroyo* but directly contrary to the Third Circuit decision herein—that the function of determining the legality with which trust funds are administered belongs, not to federal, but to state law, *Employing Plasterers' Ass'n.* v. *Journeymen, etc.*, 279 F.2d 92, 97 (C.A. 7, 1960); *Blassie* v. *Kroger Co.*, 345 F.2d 58 (C.A. 8, 1965); *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421, 424-6 (C.A. 1, 1968); *Bowers* v. *Moreno*, 520 F.2d 843 (C.A. 1, 1975); *Miller* v. *Davis*, 507 F.2d 308 (C.A. 6, 1974); *Snider* v. *All State Administrators, Inc.*, 481 F.2d 387, 390-1 (C.A. 5, 1973), *cert. denied*, 415 U.S. 957; *Costello* v. *Lipsitz*, 547 F.2d 1267 (C.A. 5, 1977); *Lugo* v. *Employees Retirement Fund*, 529 F.2d 251 (C.A. 2, 1976), *cert. denied*, —— U.S.——, 97 S.Ct. 81; *Prescription Plan Service Corp.* v. *Franco*, 552 F.2d 493 (C.A. 2, 1977).

The Court of Appeals in this case, however, looking to the mandate of *Lincoln Mills*, *supra*, declared the existence of "a federal common law cause of action implied from provisions of § 302(c)(5)" (22a) and opined that "the same policy considerations which favored recognizing a uniform federal law of collective bargaining agreements apply with equal force to support the application of federal common law to the instant claim. . . ." (9a) Elaborating on this broad departure, it contemplated that 'federal courts would fashion both remedial and substantive rules of law for [the] disposition" of such actions (24a); declared that "fiduciary duties applicable to the present case must be fashioned from federal common law under § 302" (28a & n. 31): stated that "302(e) establishes a federal forum in which to try claims of a breach of fiduciary duty by a union pension fund trustee" (9a & n. 12); and recited that "a claim of *tortious interference* with a collective bargaining agreement by a Fund trustee states a non-frivolous cause of action under § 301 of the Taft-Hartley Act. . . ." (9a & n. 12) (emphasis added).

While these heady views may find some support in law review articles by isolated commentators, (See citations in the Court's opinion, 9a & n. 12), they are not supported by federal court authority at any level. Although the particular conflict between the Court of Appeals' decision here and decisions of other Circuits in their interpretations, respectively of Section 302 and Section 301 will be examined in the ensuing sections, the point here—more broadly—is that in authorizing development of federal common law principles for governance of collectively-bargained trusts the Third Circuit is by itself on a foray which other courts have expressly declined to join. Thus, in *Bowers* v. *Ulpiano Casal, Inc.*, *supra*, the First Circuit declared itself in accord with "the current majority position that section 302(e) is not the foundation stone for federal court management of trust funds," 393 F.2d at 426. Accord: *Bowers* v. *Moreno*, *supra*. Similarly, in *Snider* v. *All State Administrators*, *supra*, 481 F.2d at 390, the Fifth Circuit stated that collectively-bargained funds are "established under the laws of the respective

states" and that "[s]tate authority remains the legal foundation upon which such funds are constructed." Accord: *Costello* v. *Lipsitz, supra; Miller* v. *Davis, supra.*

Most recently, in *Prescription Plan Service Corp., supra,* the Second Circuit declined a request that it "create a 'federal common law tort,' " 552 F.2d at 495 —comparable to that of "tortious interference with a collective bargaining agreement" which the Third Circuit recognized here. The Second Circuit held that this was not one of those "few and restricted" instances in which federal common law should be developed, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963)." Id. It expressly rejected the argument that *Lincoln Mills* was authority for judicially federalizing the law of collectively-bargained funds:

> "Appellant's reliance on *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 923, 1 L. Ed.2d 972 (1957), is misplaced. *Lincoln Mills* did hold that a federal grant of jurisdiction could be the basis for implying federal substantive remedies, but the Supreme Court there was deciding a choice-of-law question—whether to apply state or federal law to suits for violation of labor contracts—in a context in which jurisdiction in the federal courts was clear under LMRA § 301(a), 29 U.S.C. § 185(a). Here, by contrast, appellant's claim does not fall within the jurisdictional terms of the statutes on which it relies. The *Lincoln Mills* holding, moreover, rested on a careful examination of congressional intent to provide substantive remedies under LMRA § 301; no similar intent is even suggested by appellant here. While the *Lincoln Mills* Court believed §301 was intended to be read broadly, 353 U.S. at 456, 77 S.Ct. 923, the principal statute at issue here,

> § 302, has consistently been read narrowly by this court, *Lugo* v. *Employees Retirement Fund, supra,* 529 F.2d at 255; *Cuff* v. *Gleason*, 515 F.2d at 127 (2d Cir. 1975) (per curiam)." 522 F.2d at 495-6.

In *Lugo*, the Second Circuit had held that it would be particularly inappropriate to mandate judicial development of a federal common law of fiduciary standards for collectively bargained funds in the face of Congress' enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001, *et seq.*, comprehensively governing fiduciary responsibilities applicable to such funds, 29 U.S.C. 1101-1114: [9]

> "Plaintiff argues, on the other hand, that the quoted language, coupled with the jurisdictional grant in section 302(e), confers on the federal courts the power to create a federal common law

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[9] The legislative history of these sections makes plain Congress' recognition that theretofore fiduciary standards had been governed wholly by state law, *Legislative History of the Employee Retirement Income Security Act of 1974*, prepared by the Subcommittee on Labor, Senate Committee on Labor and Public Welfare (1976), pp. 597, 2350-4, 2359, 3295-6, 3359. The reports issued by the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare, on the Bills which ultimately became ERISA, contained the identical description of the limited nature of regulation provided by Section 302:

> "The Labor-Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct."

Id at pp. 590, 2351 (House Report No. 93-533 on H.R. 2 93rd Cong., Ist. Sess.; Senate Report 93-127 on S. 4 93rd Cong., 1st Sess.).

governing the management of pension plans. Cf. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L. Ed 2d 972 (1957). We have considerable doubt about this proposition. The length and detail of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, indicate that the regulation of pension funds with regard to such matters as vesting and procedural rights is a complex task more appropriate for Congress than for the courts. *The careful attention paid by Congress in that recently enacted statute to the problem of effective dates and coverage makes us hesitate to conclude that the courts have long been authorized, via the fifth exception to a criminal statute, . . . [§ 302(c)(5)], to create obligations similar to those of ERISA.*" (Footnotes omitted; Emphasis supplied) 529 F.2d at 255.[10]

Thus, in holding that the Federal Courts are authorized by the Labor-Management Relations Act to develop "both remedial and substantive rules of law" for the disposition of federal actions such as this one involving administration of collectively-bargained pension and welfare trust funds (24a), the Third Circuit was undeterred by the lack of guidance from this Court and unhampered by the unanimous declination by other Circuits to promulgate and enforce federal

[10] Notably, the approach of the Third Circuit opinion, authored by Judge Gibbons, is contrary to that of *Nolan* v. *Meyer*, 520 F. 2d 1276 (C.A. 2, 1975) where Judge Gibbons, sitting by designation, also spoke for the Court. There Judge Gibbons acknowledged that the effect of ERISA was prospective and accordingly, refused to mandate federal common law to govern entitlement to certain profit-sharing benefits, which like the fiduciary standards here, had otherwise been left to state law, 520 F. 2d at 1278.

standards governing collectively-bargained trusts.[11] The recognition of new federal common law rights and remedies by a lower federal court, as here, contrary to unanimous authority that the underlying federal statute is not to be so construed, is necessarily a matter which calls for the exercise of this Court's certiorari jurisdiction.

The Court of Appeals' result conflicts dramatically with the rationale of this Court's holding in *Santa Fe Industries* v. *Green*, —— U.S. ——, 97 S.Ct. 1292 (1977), decided only last Term. There, in the context of federal securities litigation, the Court disapproved the federalization of fiduciary standards in connection with governance of corporations. It observed: "this extension of federal securities laws would overlap and quite possibly interfere with state corporate law . . . Absent a clear indication of congressional intent, we are reluctant to federalize [a] substantial portion of the law of corporations. . . .", 97 S.Ct. at 1303-4. As indicated by such decisions as *Snider*, *supra*, and *Lugo*, *supra*, the same may be said of judicial federalization of fiduciary standards pertaining to governance of collectively-bargained trusts.

[11] The Court of Appeals cited *Crawford* v. *Cianciulli*, 357 Public Welfare (1976), pp. 597, 2350-4, 2359, 3295-6, 3359. The F. Supp. 357, 367 (E.D. Pa., 1973), as a case recognizing that approval of federalization of fiduciary standards of collectively-bargained for contract obligation "is not foreclosed by prior case law and is not frivolous." (12a). *Crawford* said no such thing. To the contrary, *Crawford* held, as the District Court here recognized, that the creation of a federal common law of collectively-bargained trusts "must be directed to another forum." (97a). The District Court, quoting *Crawford*, held that guidance from this Court had not authorized such an expansive interpretation of Section 302. "Without guidance by the Supreme Court we do not have authority to establish such a federal common law for union-management negotiated pension fund agreements." (97a), quoting *Crawford* v. *Cianciulli*, 357 F. Supp. 357, 360 (E.D. Pa., 1973).

A. The Court of Appeals' Finding of Federal Jurisdiction under Section 302(e) and Its Declaration of an Implied Damage Remedy Thereunder Conflict with Arroyo v. United States, 359 U.S. 419 (1959), and the Decisions of Other Courts of Appeals.

In enacting Section 302 of LMRA, 29 U.S.C. 186, Congress addressed the corruptive influence of payments by employers to the bargaining representatives of their employees, making it generally unlawful for any employer to offer, or any representative to accept, money or other things of value, Section 302 (a) and (b), 29 U.S.C. 186(a) and (b). This blanket prohibition is subject to several specific exceptions, Section 302 (c), 29 U.S.C. 186(c), including that set forth in Section 302(c)(5), for payment to certain collectively-bargained trust funds. Congress sought to shield such funds from corruptive influence by allowing employer payments to be made only to trusts complying with the structural specifications which Section 302(c)(5) sets forth. Particularly relevant to this litigation are the specifications that "employees and employers are equally represented in the administration of such fund. . . ." and that the fund be established "for the sole and exclusive benefit of employees." In subsection (d), Congress established a criminal penalty for violations of Section 302 and in subsection (e) it established federal jurisdiction "to restrain violations" thereof.

Except for the decision by the Court of Appeals in this case, Section 302(e) has never been taken as a foundation stone for federal court management of trust funds. Rather, it has been generally held to authorize exercise of federal equity jurisdiction to eliminate potential corruption by correcting "structural violations" and thereby conforming collectively-bargained trusts to the specifications of Section 302(c)(5). *Bowers* v. *Ulpiano Casal, Inc.*, *supra*, 393 F.2d

at 424; *Lugo*, *supra*, 529 F.2d at 255; *Moyer* v. *Kirkpatrick*, 265 F.Supp. 348 (E.D.Pa., 1967), aff'd, 387 F.2d 955 (C.A. 3, 1968); *Snider*, *supra*, 481 F.2d at 390; *Johnson* v. *Bottica*, 537 F.2d 930, 933 (C.A. 7, 1976).

The correction of structural violations has, however, never been even a part of Respondents' objective in this suit. The sole "structural violation" found by either court below was a breach of the statutory requirement of equal representation which the District Court found continued until 1967 (18a, 78a). Respondents never sought to enjoin the continuation of such violation.[12] Their 1963 and 1965 complaints neither asserted jurisdiction under Section 302 nor, in any way, took issue with the composition of the Trustees' Committee. It was not until 1969—after the Court of Appeals had rejected their original jurisdictional basis and after the unequal representation ultimately found by the District Court had been corrected—that they first looked to Section 302(e). Still not seeking injunctive relief, Respondents in their amended complaint alleged that unequal representation had existed—by way of the *prior* composition of the Trustees' Committee—and that the Fund had not been established for the sole and exclusive benefit of employees.[13]

The District Court, under those conditions, held jurisdiction under Section 302(e) to be lacking. It held

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[12] Nor, obviously, did they ever seek to enjoin the making of payments into what would have been an illegally constituted trust; their complaint, as noted by the District Court (80a-81a), has always been that *more* such payments were *not* made.

[13] Neither in the Amended Complaint nor thereafter did Respondents suggest to the District Court that injunctive relief was necessary either to correct, or prevent recurrence, of unequal representation or any other structural violation.

that Respondents' amended complaint failed to state a valid claim of violation of the "sole and exclusive benefit" requirement (80a-81a), a conclusion with which the Court of Appeals did not disagree. With respect to unequal representation, the District Court held as follows:

> "... [T]he fact that the Fund violated the equal representation requirement during the years 1948-1967 is not in itself sufficient to confer jurisdiction under Section 302(e). '[D]istrict court jurisdiction under Sec. 302(e) is limited to restraining future violations of the statute and does not include granting relief by way of accounting, receivership, or removal of defalcating trustees or administrators.' Snider v. All State Administrator, Inc., 481 F. 2d 387 (5th Cir. 1973). *See also* Moyer v. Kirkpatrick, 265 F. Supp. 348 (E. D. Pa. 1967), *aff'd per Curiam*, 387 F. 2d 955 (3d Cir. 1968). Inasmuch as plaintiffs seek no future injunctive relief with respect to the composition of the Fund's trustees, but claim instead what is in effect an accounting of the damages allegedly caused the Fund by an imbalance in the makeup of the trustees at a time almost ten years ago, Section 302(e) confers no jurisdiction in this Court over plaintiffs' claim to the extent that it is based on a violation of the equal representation requirement." (78a)

In short, Respondents had invoked federal equity jurisdiction at a time when structural violations within the purview of Section 302(e) were neither existing nor threatened.

The Court of Appeals acknowledged that the structural violation had been corrected at the time of Respondents' amended complaint, but reasoned that the amendment could, under Rule 15(c), F. R. C. P., "relate back to the filing of the § 301 complaint in 1965" so as to vest Section 302(e) equitable jurisdiction as of a time prior to correction of the violation (18a). Second, the Court of Appeals held—as a matter of remedial law—that, regardless of its terms, Section 302(e) authorizes not only injunction restraint of violations of Section 302(e) but implies a damage remedy as well (23a-25a). Third, the Court of Appeals declared—as a matter of substantive law—that "[a]ny fiduciary duties applicable to the present case must be fashioned from federal common law under § 302." (28a & n. 31). The Court's holding as to Section 302 in each of these three respects is contrary to decisions either of this Court, other courts of appeals, or both.

1. Absent Any Existing or Threatened Structural Violation of Section 302 at The Time Section 302(e) Is Invoked, There Can Be No Jurisdiction Thereunder.

The Court of Appeals' Section 302 holding rests at the outset, on a totally novel application of the "relation back" doctrine of Rule 15(c), F.R.C.P. The concern of that Rule is with the *timeliness* of amended pleadings under *statutes of limitations*. It has not—other than by this Court of Appeals—been applied so as retroactively to vest subject matter jurisdiction even though conduct which might earlier have been enjoined has, in the interim since the original complaint, ceased without even a suggested threat of recurrence. The sole authority cited by the Court of Appeals, *3 Moore's Federal Practice*, 15-15 [3], in no way suggests any application of the relation-back doctrine other than to escape the effect of limitations.[14] Indeed,

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[14] Even if limitations were the question here, the Court of Appeals' application of the relation-back doctrine would be

the outset of Professor Moore's discussion focuses the purpose of Rule 15(c):

> ... Rule 15(c) is based on the concept that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice *that statutes of limitations are intended to afford*. Thus, if the original pleadings gives fair notice of the general fact situation out of which the claim or defense arises, an amendment which merely makes more specific what has already been alleged ... *will relate back even though the statute of limitations has run in the interim.*" 3 Moore, *supra*, at pp. 1025-26 (Emphasis added).

Rule 15 was never intended to address the situation where what has lapsed in the interim is not limitations but the basis of federal jurisdiction.

Application of the Rule 15(c) concept in this context is contrary to fundamental notions of both equity and federal jurisdiction under the United States Constitution, Art. III, Sec. 2. The measure of equitable jurisdiction to grant an injunctive remedy such as that provided in Section 302(e) is whether some violation is either existing or threatened, *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953). There, this Court stated:

"The purpose of an injunction is to prevent future

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incorrect. Contrary to the Court of Appeals' recitation, the predicate for Section 302(e) jurisdiction—past unequal representation—is not common with the claims which Respondents had made in the past. As stated above, Respondents' 1965 Complaint was simply silent as to composition of the Trustees' Committee. As Professor Moore recites, "An amendment which changes the jurisdictional basis of an action will ... relate back, the factual situation alleged otherwise remaining unaltered." 3 Moore, *supra* at p. 1031. Here, the Amended Complaint alleged different facts.

> violations ... [T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violations, something more than the mere possibility which serves to keep the case alive." 345 U.S. at 633.

W. T. Grant Co. is significant both for its similarities to this case and its differences. There, the Court affirmed dismissal of a suit by the United States under the Clayton Act, which sought to enjoin continuation of certain interlocking directorships, because the challenged conduct had been discontinued and the lack of any threat of recurrence was not genuinely in dispute. Given a voluntary cessation of the challenged conduct and the absence of any threat of recurrence, this Court upheld the District Court's conclusion that the United States, as the moving party, had failed to demonstrate "that relief is needed." This case is similar because it too presents a voluntary cessation of the challenged conduct without even an attempted demonstration by Respondents of need for injunctive relief available under Section 302(e). This, however, is an *a fortiori* case as compared with *W. T. Grant Co.* There, the conduct in question was discontinued only *after* it had been challenged by the Government's suit, and the Government's complaint *did allege* a threat of recurrence. That being the case—though it upheld the dismissal as a matter of equitable *discretion* and *practice* —this Court observed that the issue had not become technically moot and that the court's constitutional *power* to treat with it survived the cessation, 345 U.S. at 632-3. Here, in contrast, the alleged unequal representation was voluntarily discontinued *before* Respondents put it at issue and Respondents did not even *allege* a threat of recurrence. That being the case, dismissal of the Section 302 claim was due not only as a

matter of *equitable discretion*, but for lack of power to adjudicate as well. The amended complaint failed to allege a live, present "case or controversy" as required by Art. III, Sec. 2 of the Constitution. Any dispute as to existence of a Section 302 structural violation was, in fact, moot as of the time Respondents first presented it in their amended complaint. As of that time, it was at most, "merely an unfortunate event in history [without] present legal consequences." *United Air Lines* v. *Evans*, —— U.S. ——, 97 S.Ct. 1885, 1889 (1977).

Whether the amended complaint may "relate back" for purposes of avoiding the bar of limitations is simply irrelevant to whether it could relate back so as to revive a moot question as to which any constitutional case or controversy has since lapsed. Where a question has become moot, a federal court has no authority under Article III of the Constitution to exercise jurisdiction. *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 & n.3 (1964). Unlike the bar of limitations addressed by Rule 15(c), F.R.C.P., the constitutional requirement of a present case or controversy cannot be defeated through the fiction of "relation back."

2. Section 302(e) By Its Terms Authorizes Only An Injunctive Remedy "To Restrain Violations" of Section 302 And Does Not Authorize Judicial Declaration Of An Implied Cause Of Action for Damages.

Section 302(e) provides an injunctive remedy:

> "The district courts of the United States . . . shall have jurisdiction . . . to restrain violations of this Section."

While the lower federal courts have spoken frequently regarding the scope of remedial jurisdiction authorized by Section 302(e), this Court has had occasion to do so only once. In *Arroyo*, *supra*, this Court stated that trustees of collectively-bargained funds would not be "accountable under federal law, *except by way of the injunctive remedy* provided in" Section 302(e), 359 U.S. at 427 (Emphasis added).[15]

At the outset it should be clear that there is square circuit conflict as to the reading to be given this Court's comments in *Arroyo* regarding the scope of Section 302(e) jurisdiction.

The Court of Appeals here read the quoted language of Justice Stewart as "simply a rejection of the contention that § 302 is the source of a federal common law crime not expressly defined by statute" and concluded that it did not preclude the declaration of an implied action for damages (22a & n. 25).[16]

In contrast, the Fifth Circuit in *Snider*, *supra*, 481 F. 2d at 390, declared itself:

> "persuaded . . . by the weight of reason and authority and by the plain language of the statute that district court jurisdiction under Sec. 302(e) is limited to restraining future violations of the statute and does not include granting relief by way of accounting, receivership, or removal of defalcating trustees or administrators."

It proceeded to quote the same passage from *Arroyo*, *supra*, and concluded as follows:

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[15] The District Court, like Petitioner, read *Arroyo* as barring relief under Section 302(e) other than an injunctive remedy to prevent and correct violations in the future.

[16] Petitioner submits that the Court of Appeals' reading of *Arroyo* was wrong. If, as the Court of Appeals suggests, Justice Stewart had meant only to disapprove conviction of a common law crime, he undoubtedly would have said so in so many words, rather than stating that Section 302(e) allowed trustees to be held accountable only by way of the injunctive remedy provided in that Section.

"[T]he federal court's ultimate exercise of adjudicatory power under this section is limited to the prevention of future violations, since the Congress, as architect of its jurisdictional gambit, has not chosen to empower it to require an accounting or similar noninjunctive relief." Id.

The other circuits that have addressed the question of the scope of remedial jurisdiction under Section 302(e) are in accord with *Snider*. In *Bowers* v. *Ulpiano Casal, Inc., supra*, the First Circuit described Section 302(e) as "a preventive civil remedy to enforce compliance with the statutory standards", 393 F. 2d at 425, and noted that it "speaks in terms of restraining action" and not of such remedies as "cancellation of a mortgage and the repayment of liquidated sums." 393 F. 2d at 426.[17] Similarly in *Bowers* v. *Moreno, supra*, the First Circuit again stressed the "limitation[s] of relief authorized by 302(e)"; referring to *Haley* v. *Palatnik*, 509 F.2d 1038 (C.A. 2, 1975), where Section 302(e) substantive jurisdiction had been upheld, it stated that "[a]ny ultimate relief given in *Haley* would similarly be limited to enjoining future payments." 520 F. 2d at 846.[18]

The Seventh Circuit in *Employing Plasterers' Ass'n., supra*, 279 F.2d at 97, also observed that Section 302(e) "provides the civil remedy of injunction to restrain violations of the section" and "is aimed primarily at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated." More recently, the Seventh Circuit in *Johnson* v. *Bottica*, 537 F.2d 930 (C.A. 7, 1976), reviewed the somewhat differing positions taken by various Courts of Appeals regarding the scope of substantive concerns within the purview of Section 302(e), Id. at 933-4,[19] but observed that the "language of 29 U.S.C. § 186(e), which grants to the district courts jurisdiction to restrain violations of that section, does not confer remedial power to reformulate or redraft the eligibility requirements of a pension plan." It reasoned that the "narrow latitude" allowed under Section 302(e) thus required an exception to the "general principle of equity jurisprudence" under which a court of equity is empowered to reform a trust instrument to conform to the parties' intentions, 537 F.2d at 937-8. If the scope of remedies permissible under Section 302 is even *narrower* than that normally available to a court of equity, surely implication of a *damage remedy* must be precluded as well.

Similarly, the Second Circuit in *Lugo, supra*, 529 F. 2d at 255, stated it had joined "the courts that have taken a narrow view of section 302(e)"[20] and the Ninth Circuit in *Burroughs* v. *Bd. of Trustees of Pen-*

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[17] To the extent that the First Circuit had earlier suggested the appropriateness of broader equitable jurisdiction under Section 302(e) in *Copra* v. *Suro*, 236 F. 2d 107, 114 (C.A. 1, 1956), it repudiated that view in *Bowers* v. *Ulpiano Casal, Inc.*, 393 F. 2d at 423-25.

[18] The opinion below acknowledged conflict with decisions of the First and Fifth Circuits (19a & n. 19). As seen below, however, the weight of authority is far more heavily stacked against the free-wheeling view of Section 302(e) adopted by the Court of Appeals in this case.

[19] As seen in Part I(A)(3), *infra*, none of those decisions remotely support the views of the Court of Appeals here regarding Section 302(e) substantive jurisdiction.

[20] While it said that support for the broad view "can be found in a number of cases", 529 F. 2d at 254, it cited only *Copra* v. *Suro*, supra, which it recognized had since been disavowed by the First Circuit. Petitioner is aware of no Circuit Court authority other than the decision of the Court of Appeals here holding that Section 302(e) is not a limitation upon available relief.

sion Trust, Etc., 542 F. 2d 1128, 1130 (C.A. 9, 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1113, stated that Section 302(e) "does not . . . confer general power" to go beyond "determin[ing] whether the provisions of a given retirement fund constitute a structural defect in violation of § 302(c) (5)."

Indeed, other than in this case, the Third Circuit itself has respected the limitations imposed by the language of Section 302(e) on the scope of available remedies. In *Moyer* v. *Kirkpatrick*, 387 F. 2d 955 (C. A. 3, 1968), aff'g 265 F. Supp. 348 (E. D. Pa. 1967), the Third Circuit affirmed and adopted the District Court holding that ". . . jurisdiction to restrain 'violations' of LMRA § 302 was clearly designed to prevent the prohibited payments, not to oversee or to regulate permited payments." 265 F. Supp. at 351. Peculiarly, the Third Circuit in this case declined even to cite *Moyer* even though Petitioner had expressly relied upon it as stating the law of the Circuit. The Third Circuit's omission is all the more telling in that the Fifth Circuit in *Snider*, which it did cite as taking a position contrary to that which it took here, listed the Third Circuit, in *Moyer*, as one of the several circuits which the Fifth Circuit in *Snider* joined in holding § 302 jurisdiction limited to granting injunctive relief, 481 F. 2d at 390.

3. As a Matter of Substantive Law, Section 302(e) Is Concerned With "Structural Violations" And Not Fiduciary Breaches In The Administration of Collectively - Bargained Funds.

As stated above, the overwhelming weight of lower court authority is that Section 302(e) was not intended to be a "foundation stone" for federal court supervision of collectively-bargained pension funds. The

suggestion by a few commentators that the law of fiduciary duties owed in connection with such funds be judicially federalized has been uniformly rejected by the courts of appeals other than by the Third Circuit in this case (p. 13, *supra*). As recognized by the First Circuit in *Bowers* v. *Ulpiano Casal, Inc.*, *supra*, 393 F. 2d at 425, Congress "was dealing with a very specific problem" in enacting Section 302(e) and sought to prevent potential abuses by conforming the structure of collectively-bargained trusts to the specifications of Section 302(c)(5). As a matter of *remedy*, as seen, this has meant that relief is limited to restraint *of violations;* as a matter of substance, it has meant that the violations addressed are violations of the *structure* specified by Section 302(c)(5) rather than violations of fiduciary duty owed in connection with trust administration. The two limitations, while distinct, are closely related in function. Many of the decisions holding Section 302(e) limited as to remedy also hold it limited as to substance. This is true of *Bowers* v. *Ulpiano Casal, Inc.*, *supra; Bowers* v. *Moreno*, *supra; Lugo*, *supra; Prescription Plan Service Corp.*, *supra; Snider*, *supra; Johnson* v. *Bottica*, *supra;* and *Burroughs*, *supra*. It is also true of the Third Circuit's earlier decision in *Moyer*, *supra*.

The Third Circuit's decision in this case is to the contrary. The Third Circuit's decision departs from prior authority as to substance as well as remedy. It appears to contemplate imposition of § 302 damage liability not merely for harm to a trust resulting from a structural violation—after all the District Court's finding that the Anthracite Fund had benefitted, not suffered, by its close association with the Union was not rejected by the Court of Appeals—but also for breaches of the newly-declared federal fiduciary standard. Such a result is yet a further step removed from Con-

gress' "very specific" concern, *Bowers* v. *Ulpiano Casal, Inc., supra*, in enacting Section 302.

B. The Holding that Section 301 of LMRA Confers Jurisdiction to Adjudicate Claims of Negligence and Breaches of Trust in the Administration of a Collectively Bargained Pension Fund Is Contrary to the Plain Words of the Statute and Is Inconsistent with Thirty Years of Interpretation of Section 301 by This Court and the Courts of Appeals

In reversing the District Court's holding that jurisdiction of Respondents' Complaint was lacking under Section 301 of LMRA, the Third Circuit was confronted with the decision which it entered seven years earlier in this very case. In its 1968 decision, the Court had found that no violation of contract had been pleaded nor could one be found. Accordingly, it held that jurisdiction was lacking because "violation of [a] contract . . . [is] the *only type of wrong* which Section 301(a) bring within federal jurisdiction." *Nedd* v. *United Mine Workers of America, supra*, 400 F. 2d at 106. (Emphasis added)

In its present decision, the Third Circuit acknowledged that it had reexamined the contract in light of its prior finding that the Union had no contractual obligation to undertake collection of royalties and again announced that "[t]here is no such obligation." (7a & n. 7). Contrary to the earlier decision, the present Third Circuit panel upheld Section 301 jurisdiction despite the absence of a contract violation:

> "The federal common law of collective bargaining agreements, which grows out of 29 U.S.C. § 185 (a), would permit pension trust fund beneficiaries to sue, derivatively, to enforce the mine operators' payment obligations when the trustees did not. It is but a small step further to suggest that the same federal common law of collective bargaining agreements permits a suit against the Fund Trustees, and the Union which allegedly acted in concert with them for the destruction of the value of the bargained-for and vested contract rights.

* * *

> "While we certainly do not hold that all breaches of fiduciary duty may be redressed in an action under § 301 of the Labor Management Relations Act, sound public policy compels the conclusion that § 301 supports a federal common law cause of action for tortious interference with a collective bargaining agreement by a pension fund trustee, in violation of his fiduciary duty to the pensioners. (footnote omitted) (9a, 11a & n. 13).

Despite the Third Circuit's effort to limit its recent holding, the conclusion that even *some* fiduciary breaches are federally actionable under Section 301 is a quantum leap, not a mere 'small step," from the plain words of Section 301(a). The language of the statute is, in this respect, clear and unequivocal:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (168a.)

Because the statute so clearly addresses only "violation of contracts," the Courts have had limited opportunities to decide whether jurisdiction extends beyond contract violations to matters involving alleged fiduciary breaches or 'tortious interference" with contrac-

tual rights. This Court has frequently provided guidance in Section 301 cases, but has never even hinted that torts or fiduciary breaches are cognizable wrongs under Section 301.[21] Those Circuits which have expressed their views, are squarely in conflict with the result below. In *Mumford* v. *Glover*, 503 F.2d 878 (C. A. 5, 1974), the Fifth Circuit held as follows:

"Section 185 provides jurisdiction only in 'suits

[21] Since *Lincoln Mills*, this Court has decided a wide variety of Section 301 actions. Thus, this Court has required the exhaustion of contract remedies before initiation of a Section 301 suit, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); has held that individuals may file Section 301 actions for violations of collective bargaining agreements, *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962); and has held that remedies for contract violations include the awarding of damages, *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) as well as injunctive relief; *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). While not directly holding that only contract violations are adjudicable in Section 301 actions, all of the foregoing cases emphasize and underscore the contractual nature of Section 301 suits.

Two other decisions by this Court indicate that Section 301 jurisdiction is purely contractual. In *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) this Court held that the word "contract" in Section 301(a) included a strike settlement agreement. By detailing the indicia of those agreements which were enforceable in Section 301 actions (369 U.S. at 28), the *Lion Dry Goods* decision clearly negates any contention that Section 301 provides a jurisdictional basis for adjudication of non-contract suits. Finally, when this Court determined what limitations period was applicable to Section 301 actions, it held that reference should be made to the appropriate state statute of limitations in contract—not tort—actions. *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

> for *violation of contracts* between an employer and a labor organization . . . or between any such labor organizations' (emphasis supplied). This section expressly requires a violation of a labor contract before it may be employed as a jurisdictional device. And the literal meaning of the statute is the first reference for Congressional intent. Perry v. Commerce Loan Co., 1966, 383 U.S. 392, 400, 86 S.Ct. 852, 15 L.Ed.2d 827, 833, quoting United States v. American Trucking Associations, 1940, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed.1345, 1350; Flora v. United States, 1958, 357 U.S. 63, 65, 78 S.Ct. 1079, 2 L.Ed.2d 1165, 1167; Ray Baille Trash Hauling Inc. v. Kleppe, 5 Cir. 1973, 477 F.2d 696, 707. It is on this basis that we decide that Section 185 will not serve to bring this action before a federal court." 503 F.2d at 882 (emphasis in original text).

More recently, the Sixth Circuit adhered to its prior decision in *Palnau* v. *Detroit Edison*, 301 F.2d 702, 704 (C.A. 6, 1962) which had held that Section 301 is limited to adjudication of contract violations, *Miller* v. *Davis*, 507 F.2d 308, 311 (C.A. 6, 1974). In *Miller*, the Sixth Circuit declared that Section 301 "does not establish subject matter jurisdiction over claims of improper administration of union trust funds." 507 F.2d at 311.[22]

The conflict is most pronounced between the decision below and *Bowers* v. *Ulpiano Casal, Inc.*, *supra*, where Judge Coffin of the First Circuit considered and re-

[22] Quoting from *Snider* v. *All State Administrators, Inc.*, *supra*, the Sixth Circuit noted that "'[s]tate authority remains the legal foundation upon which such funds are constructed'" and "govern[s] the obligations of the Fund's trustees. . . ." 507 F. 2d at 311 & n. 3.

jected the very rationale for extending Section 301 jurisdiction which Judge Gibbons adopted here. The *Bowers* appellants urged that since *Smith* v. *Evening News Ass'n.*, 371 U.S. 195 (1962) authorized them to sue for violations of a collective bargaining agreement, they should also be permitted individually to sue the fund trustees and those who allegedly conspired with them. Unlike the Court below, the First Circuit declined to find that such "tortious interference" with a contract could be an actionable contract violation within the meaning of Section 301:

> "Even if *Smith* were to be so extended, however, the complaint against these appellees does not and could not allege that they have violated a contract. While appellees allegedly knowingly shared in the fruits of malfeasance and possible breach of contract on the part of the Fund's trustees, they themselves can no more be successfully sued 'for violation of contract' than one who buys a house from a seller, knowing that the seller has broken his exclusive agency agreement with a broker." 393 F.2d at 423.[23]

Thus, no less than three other Courts of Appeals have expressly rejected the interpretation of Section 301 adopted by the Third Circuit in the instant decision.

Ironically, the most cogent articulation of the limitations of Section 301 jurisdiction was expressed by Judge Hastie, in this very case, eight years ago:

> "We recognize that the enforcement of collective bargaining agreements under Section 301(a)

[23] *Accord*: *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F. 2d 281, 285-287 (C.A. 1, 1970). See also *Alexander* v. *Pacific Maritime Ass'n.*, 314 F. 2d 690, 694 (C.A. 9, 1963).

> 'calls into being a new common law,' John Wiley & Sons, Inc. v. Livingston, 1964, 376 U.S. 543, 550, 84 S. Ct. 909, 914, 11 L. Ed. 2nd 898, which in some aspects is fashioned 'from the policy of our national labor laws.' Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448, 456, 77 S. Ct. 912, 918, 1 L. Ed 2d 972. But we find nothing in national labor policy which would justify abrogation of normal conceptions of contract law in order to characterize the union's conduct in failing to compel the operators to carry out their promises to it as a breach of the union's own contractual undertaking.
>
> * * *
>
> . . . [W]e think that the union's failure to act . . . was not 'a violation of [a] contract between an employer and a labor organization', the only type of wrong which section 301(a) brings within federal jurisdiction." *Nedd* v. *United Mine Workers of America*, *supra*, 400 F. 2d at 105-106.[24]

Petitioner submits that nothing has changed in the past eight years which could somehow transform a tort into a contract violation.[25]

The Third Circuit's decision represents a far-reach-

[24] Prior to the present case, the Third Circuit decisions had consistently held—both before and after the earlier *Nedd* decision—that Section 301 provided jurisdiction to adjudicate only contract violations. *Leskiw* v. *Local 1470, IBEW*, 464 F. 2d 721, 722-23 (C.A. 3, 1972); *Adams* v. *Budd Co.*, 349 F.2d 368 (C.A. 3, 1965).

[25] If anything, the events of the past eight years militate more strongly than before that Section 301 be strictly limited to contract violations. During this period, ERISA was enacted establishing pervasive pension regulations including fiduciary standards and federal jurisdiction to remedy violations of that statute and regulations. Further, the proliferation of

ing departure from uniform doctrine developed over the more than 30 years since the enactment of Taft-Hartley so as to comprehend a broad range of conduct not federally actionable heretofore. The Rule 19 standards for review by this Court are amply satisfied. Certiorari should be granted so that the circuit conflicts over the proper scope of federal court jurisdiction under Sections 301 and 302 may be resolved before they deepen and expand.

II. THE HOLDING THAT PETITIONER OWED A DUTY OF FAIR REPRESENTATION TO RETIREES—PERSONS INDISPUTABLY OUTSIDE THE BARGAINING UNIT—IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN PITTSBURGH PLATE GLASS AND THE ENTIRE LINE OF FAIR-REPRESENTATION DECISIONS WHICH LIMIT THE DUTY ONLY TO BARGAINING UNIT EMPLOYEES.

Respondents also asserted federal jurisdiction under 28 U.S.C. 1331 and 1337 contending that the Union owed them—as retirees—a duty of fair representation. The District Court concluded that *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (*PPG*), which held that retirees were not "employees" under federal labor law and were not within the bargaining unit, foreclosed any duty of fair representation claim because the "duty" extends only to bargaining unit members. Indeed, in *Pittsburgh Plate Glass*, this Court so stated:

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legitimate contract actions under Section 301 has already seriously taxed the resources of the district courts. If the statute is construed contrary to its plain words, as consistently interpreted over 30 years, to include tort claims and fiduciary violations, it would unnecessarily embroil the district courts in additional, massive litigation. *See Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397, 411 & n. 12 (1976).

> "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." 404 U.S. at 181 & n. 20.

The Court of Appeals rejected the District Court's determination that *PPG* was dispositive, holding—incorrectly—that Petitioner owed a duty of fair representation to the retiree respondents (a) because the duty of fair representation is not limited to bargaining unit employees; and (b) because the Union, having undertaken to bargain for retirees, owed a duty to bargain fairly on their behalf.

A. The Court of Appeals Decision is Inconsistent with the Entire Line of This Court's Fair Representation Decisions.

Since spawning the duty of fair representation in *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944), and *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), this Court has repeatedly declared that the duty is owed only to members of the bargaining unit. Members of the bargaining unit can include only persons who are "employees" as defined by Section 2(3) of LMRA, 29 U.S.C. 152(3), and who are employed within a bargaining unit for which the particular union is the exclusive representative. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), the Court reviewed the evolution of the fair representation duty noting its scope of recipients as follows:

> "It is now well established that, as the exclusive bargaining representative of the employees in [the] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . see Ford Motor Co. v. Huffman, 345 U.S. 330, Syres v. Oil Workers International Union, 350 U.S. 892, and

in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 U.S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N.R. Co., 323 U.S. 192, Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, and was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v. Huffman, *supra*. Under this doctrine, the exclusive agent's statutory authority to represent *all members of a designated unit* includes a *statutory obligation to serve the interests of all members* without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey* v. *Moore*, 375 U.S. at 342." 386 U.S. at 177 (Emphasis supplied).

There are scores of decisions which hold that the duty of fair representation is co-extensive with the bargaining unit the Union is certified to represent. The essence of the "duty"—that it was created as a result of a union's exclusive status and owed only to those employees the union was authorized to represent in the unit—was only recently re-emphasized by this Court:

> "[W]e have held, by the very nature of the exclusive bargaining representative's status as representative of *ALL* unit employees, Congress implicitly imposed upon it a *duty* fairly and in good faith to represent the interests of minorities within the unit. *Emporium Capwell Co.* v. *Western Addition Comm. Org.*, 420 U.S. 50, 64 (1975)." (Emphasis supplied; capitalized word is emphasized in original text).

The duty exists to assure that a bargaining representative which enjoys exclusive status under federal law acts fairly on behalf of all persons for whom it exercises mandatory bargaining prerogatives. To extend the duty of fair representation to persons who are neither "employees" nor "bargaining unit members" is totally inconsistent with the duty's *raison d'etre*.

In declining to follow the foregoing decisions and by extending the duty owed by Petitioner to non-bargaining unit members, the Third Circuit relied exclusively on *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). Remarkably, the Court relied upon *Howard* even though it quoted the following passage from *Pittsburgh Plate Glass* decision declaring limits on the reach of that decision:

> "[n]othing in *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952), is to the contrary. In Howard we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The reach and rationale of *Howard* are a matter of some conjecture. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 157-159 (1957). But whatever its theory the case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." (14a quoting 404 U.S. at 181 & n. 20).

Thus, despite the clear statement that *Howard* did not require union representation of nonbargaining unit members, the Third Circuit squarely held that the foregoing quotation "preserve[d] *Howard*", that it was

applicable here, and that the Union thereunder owed a duty of fair representation to these nonbargaining unit members. To paraphrase this court in *PPG*, whatever *Howard's* theory, it obviously cannot be read, consistent with the ensuing case law, to support wholesale extension of the fair representation duty to persons who are not even "employees", let alone "employees in the bargaining unit".

Moreover, apart from the *caveat* stated in *PPG*, examination of *Howard* itself reveals unique characteristics not even remotely present here. In *Howard*, this Court held that a union representing an all-white unit of "brakemen" should be enjoined from effectuating an agreement with a railroad employer which would eliminate the jobs of black employees classified in a different unit who performed essentially the same work as brakemen. The Court held that the Railway Labor Act "prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." 343 U.S. at 774. *Howard* accorded job protection to black workers who were "employees" within the meaning of federal labor law where the existence of racially separate units ensued from racial discrimination. Surely, *Howard* does not support invocation of the fair representation duty by retirees who are not "employees" within the meaning of LMRA and whose position outside the bargaining unit is a natural incident of retirement and is attributable neither to any action by the union nor to invidious discrimination of any sort.

B. The Decision Below Is Contrary to This Court's Decision in Pittsburgh Plate Glass

The Court of Appeals, despite this Court's statement in *Pittsburgh Plate Glass* that the fair representation duty does not extend to retirees, 404 U.S. at 181 and n. 20, held that Respondents' claim was not foreclosed by that decision. It observed that retirees' benefits do form a permissive—albeit not a mandatory—subject of bargaining and reasoned that "[w]hen the Union elects to undertake such bargaining, the Union's duty of fair representation must apply." (14a).

The Third Circuit did not cite cases in support of this proposition nor did it attempt to reconcile its holding with this Court's observation in *PPG* that the duty does not apply to retirees. The conclusion that application of the duty to retirees somehow "must" follow as a result of permissive bargaining over their benefits is contrary, not only to this Court's flat statement referred to above, but to the Court's explanation as to the legal effect of permissive bargaining. The Court in *PPG* rejected the argument of the National Labor Relations Board—which parallels the Court of Appeals' holding in this case—that retirees should be treated as bargaining unit members because of the common practice of unions in bargaining over retiree benefits. The Court stated as follows:

> "[I]ndustrial practice cannot alter the conclusions that retirees are neither 'employees' nor bargaining unit members . . . Common practice cannot change the law and make into bargaining unit 'employees' those who are not." 404 U.S. at 176.

The Third Circuit's views as to the effect of permissive bargaining is contrary to *PPG* and to the reading given it by the Fifth Circuit in *Bricklayers Local 15* v. *Stuart Plaster Co.*, 512 F.2d 1017, 1029 (C.A. 5, 1975).[26] Not only did this Court in *PPG* observe that

[26] It is similarly in conflict with the reading given *PPG* by the Eighth Circuit, *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030, 1039 & n. 10 (C.A. 8, 1976):

voluntary industry-labor practice cannot expand the scope of the bargaining unit, it also declared that a union's voluntary undertaking to bargain over retirees' benefits does not oblige it, vis-a-vis those retirees to bargain for them in the future. Indeed, it was in the course of stating that a union's voluntary undertaking to bargain for retirees could have no such effect that the Court in *PPG* declared the fair representation duty inapplicable to retirees:

> "Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again.[20] To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether."

[20] "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." 404 U.S. at 181 & n. 20.

PPG makes clear that the fair representation duty —which arises out of an exclusive status conferred on the union by federal statute—cannot be created through voluntary industry-labor practices. Just as

"The Supreme Court has not yet recognized a duty to continue to bargain over what was not a subject of mandatory bargaining in the first instance. See *Allied Chemical Workers, Local 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187-88, 92 S. Ct. 383, 401, 30 L. Ed. 2d 341, 362 (1971). 'No matter how lengthy the bargaining about a permissive subject, it never changes into a mandatory subject.' C. Morris, The Developing Labor Law 425 (1971). See *NLRB* v. *Davison*, 318 F. 2d 550, 557-58 (4th Cir. 1963)."

such practices cannot transform persons foreign to the unit into bargaining unit employees, they cannot change the scope of the statutory duty.[27]

The Supreme Court's *PPG* holding rests on recognition that retirees are a "limited-purpose constituency" within a union whose inclusion in the bargaining unit "would create the potential for severe internal conflicts that would impair the unit's ability to function and could disrupt the processes of collective bargaining." 404 U.S. at 173. The same reasons that militated against holding retirees to be bargaining unit members and against holding their benefits to be mandatory subjects of bargaining, also militate against the Third Circuit's holding that the occurrence of permissive bargaining over their benefits gives rise to the fair representation duty.

Petitioner submits that *PPG* and the Third Circuit's decision cannot be reconciled. Assuming they could stand together, however, they would render a union's voluntary undertaking of permissive bargaining over retiree benefits a veritable minefield of legal hazards and create a serious imbalance in the relative bargaining positions. Employers—despite a history of per-

[27] Where permissive bargaining occurs, its effect is not to give rise to the fair representation duty, but to specified contract rights which the reitrees, as third-party beneficiaries, may enforce in an action under Section 301 of LMRA. That this was the nature of retirees' protection of rights conferred by permissive bargaining was explicitly recognized by the Court in *PPG*, 404 U.S. at 181 & n. 20. Indeed, Respondents as pension beneficiaries could have sued derivatively to enforce delinquent operators' obligations to the Fund. The Court of Appeals statement that they were somehow legally foreclosed from doing so by conduct of the Union with respect to delinquencies (15a) is simply incorrect. While Respondents remained free to sue under Section 301 for "violation of a contract", they could not sue thereunder based on "tortious interference" or breach of fiduciary duty.

missive bargaining over such benefits—would indisputably be free under *PPG* to cease bargaining at any time when to do so appeared to serve their overall bargaining strategy.[28] The union on the other hand, having undertaken voluntary bargaining, could as a result of the Third Circuit's holding, be exposed to a duty of fair representation challenge should it for overall strategic reasons abandon permissive bargaining. The union's bargaining power would be seriously compromised if its undertaking of permissive bargaining gave rise to additional legal duties while that of the employer did not. It is simply absurd to suppose that occurrence of permissive bargaining could have such a one-sided effect. Yet the Third Circuit's reading of *PPG* makes such a conclusion inevitable.

Petitioner submits that the Third Circuit's holding is in manifest conflict both with *PPG* and the readings given *PPG* by other Courts of Appeals. The need to resolve this conflict and restore the duty of fair representation to its historical scope and function amply justifies this Court's attention by way of certiorari.

III. THE COURT OF APPEALS' DISPOSITION OF THRESHHOLD ISSUES BEARING ON THE UNION'S LIABILITY UNDER RESPONDENTS' FEDERAL CLAIMS AND ITS ENTITLEMENT TO CREDIT FOR LOANS TO THE FUND DEPARTS FROM ESTABLISHED DOCTRINES OF FEDERAL LAW AS ARTICULATED IN DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Court of Appeals' discussion of the merits (31a-47a), while not resolving ultimate issues of the Union's

[28] Should the union insist on continued retiree bargaining, it would undoubtedly be charged with unfair labor practices under Section 8(b)(3) of LMRA, 29 U.S.C. 158(b)(3). Yet having voluntarily undertaken bargaining the union might be charged with breach of the fair representation duty for failing to follow through.

liability and entitlement to credit for its loans to the Fund, sets forth a number of threshhold determinations which will bear on resolution of those issues and which are blatantly contrary to established federal doctrine.

First, in describing the standard for imposition of liability, the Court of Appeals lumped together each of Respondents' federal theories and apparently declared that liability under each would be established by a showing of breach of fiduciary duty. The Court declared as follows:

> "Whether one looks to the Pennsylvania law of trusts or to an appropriate federal standard created under any of the three federal legal theories asserted by the plaintiffs the Union must, in the circumstances of this case, be held to the same standard of conduct in discharging its assumed obligations toward the Fund as that of the Fund's nominal Trustees." (36a).

Thus, with one fell swoop, and without so much as lipservice to the decisions which differentiate their distinctive natures, the Court of Appeals equated all of Respondents' federal claims with a common law breach of trust. While the District Court's analysis of the question of liability for breach of the duty of fair representation was firmly grounded in the standard of *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967) (148a-152a), the Court of Appeals abandoned that standard altogether. Similarly, while the District Court correctly held that lack of a *contract* violation by the Union disposed of the question of Section 301 liability as well as jurisdiction (112a), the Court of Appeals held—contrary to the decisions cited in Part I-B, *supra*—that the Union could be held liable under Section 301 for breaches of fiduciary duty by the trustees. The imposition of liability for breach of the duty of fair represen-

tation absent "hostile discrimination" and conduct which was either "arbitrary" or in "bad faith" (*Vaca* v. *Sipes*, 386 U.S. at 194) and for violation of Section 301 absent breach of contract would simply misconceive the parameters of established doctrine.[29] Finally, the very notion of damage liability under Section 302 is difficult to assess because of its novelty; however, the Court of Appeals' determination is necessarily contrary to decisions cited in Part I-A, *supra* holding that matters of fiduciary breach are not the concern of that section.

Second, the Court of Appeals erroneously held that, as long as two of the trustees were Union officers, the Union would be automatically answerable for the trustees' breaches—even those found to have been committed non-intentionally, in good faith, and without any purpose to benefit the Union. Notably, the District Court had found neither a factual nor a legal basis for such an imposition of vicarious liability on the Union:

> ". . . I am unwilling to infer that the Union trustees acted on behalf of the Union in their capacity as trustees from the mere fact that they were Union officials at the same time they were trustees. There would have to be additional evidence of such an improper allegiance by the Union trustees to support such an inference, and I find no such evidence in this case." (157a).
>
> "Nor did the Union trustees in this case actually act as agents of the Union in their administration of the Fund." (156a-157a).

[29] In *Humphrey* v. *Moore*, 375 U.S. 335 (1964), this Court again recognized as it had in *Ford Motor Co.* v. *Huffman*, *supra*, that "[i]nevitably differences arise" in the application of an agreement, but the "existence of such differences does not make them invalid." "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . . ." 375 U.S. at 349 quoting from 345 U.S. at 338.

In marked contrast to the result reached by the Court of Appeals is *Blankenship* v. *Boyle*, 329 F.Supp. 1089 (D.D.C., 1971), relied upon by both the District Court and the Court of Appeals below. That case involved determinations of numerous breaches of trust by trustees designated, respectively, by the Union and the employer association. The District Court in *Blankenship* held the Union liable for those specific breaches by its trustee which inured to its benefit but, contrary to the Court of Appeals here, held that neither the Union nor the employer association could be held liable for fiduciary breaches committed by their respective trustees which did not result in benefit to either, 329 F.Supp. at 192 & n.1, 1104-06.

Third, the Court of Appeals citing no cases, held that the Union would not be entitled to a credit in the amount of forgiven loans were the forgiveness found to be a gift (46a). Regardless of the motivation for forgiveness of the loans—and even if forgiveness were found to be a gift—a credit would be necessary in the interests of justice to prevent double recovery from a single source. The Third Circuit's holding in this respect is contrary to decisions of other Courts of Appeals which have held motivation irrelevant in precluding double recovery from a non-collaterial source, *Olivas* v. *United States*, 506 F.2d 1158 (C.A. 9, 1974), and to its own decision which it failed to cite, *Feeley* v. *United States*, 337 F.2d 924 (C.A. 3, 1964). Contrary to the Third Circuit's reasoning, if forgiveness of the loans were a gift, that would only further demonstrate the Union's unstinting support for the Fund and its benefiiciaries, and provide further equitable basis for allowance of a credit.

CONCLUSION

To reach the result it sought, the Third Circuit panel repudiated a thorough and well-reasoned District Court decision, disregarded its own prior decisions and the decisions of this Court, adopted unprecedented views regarding the scope of federal jurisdiction, deemed the Petitioner presumptively answerable for the effect of an industry-wide collapse, and treated as practically irrelevant the millions of dollars loaned by Petitioner to enable pension payments to continue. For some reason unknown to Petitioner, the Third Circuit, as indicated by the tenor of its opinion, the novelty of its jurisdictional holdings and the lengths to which it went to distinguish and indeed overlook contrary authority, appeared to have been virtually predisposed to find for Respondents.

In addition to exposing the Petitioner to a potential multi-million dollar liability, the decision below constitutes an unwarranted expansion of federal jurisdiction which is contrary to thirty years of interpretation of the labor statutes by this Court and the various Courts of Appeals. The granting of certiorari is essential in order to resolve the circuit conflict and to restore federal court jurisdiction in labor cases to its historical scope.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1978

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS

Appellants

AND

EMMETT THOMAS, MART F. BRENNAN, and JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund

v.

UNITED MINE WORKERS OF AMERICA, an unincorporated trade union association; EMMETT THOMAS, NICHOLAS J. HAYDOCK and JOHN D. JILLSON, Trustees of the Anthracite Health and Welfare Fund,

Joseph Fauzio; Frank J. Galgay, (Added as Trustees of Anthracite Health and Welfare Fund, per D.C. order of 7/3/74)

(D.C. Civil Action No. 8796)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued February 24, 1977

Before FORMAN, GIBBONS and ROSENN, Circuit Judges

OPINION OF THE COURT

(Filed April 28, 1977)

GIBBONS, Circuit Judge.

This appeal concerns the right of pensioned coal miners to obtain relief for the failure of their pension fund trustees and their union to enforce anthracite coal mine operators' contractual obligations to pay a tonnage royalty to the Anthracite Health and Welfare Fund ("The Fund"). It has been litigated in the federal courts for fourteen years. There has been other, related litigation, seeking the same object: payment of earned sums for the benefit of the Fund's lawful *cestuis*.[1]

The Fund was created by the terms of the Anthracite Wage Agreement of 1946, when anthracite production was at its modern peak. Its purpose was to provide miners with retirement pensions. A sharp and prolonged decline in the anthracite mining industry, the result of competition from other energy sources, resulted in reduced income to the fund. In addition to the decline in production substantial delinquencies also accrued. By 1962, 120 mine operators owed almost $12 million to the Fund.

The gravaman of the pensioners' complaint, whether predicated on federal or on state law, is that the Trustees and the Union favored the interests of working miners over those of retirees and therefore failed to take prudent action to collect delinquencies from mine operators, who provided job opportunities. The district court rejected the contention that any harm resulted to the Fund from its relationship with the Union, and held that neither the Union nor the Trustees are liable to the Fund on account of the delinquencies.

On March 11, 1963 the pensioners filed a diversity action against the United Mine Workers, which was

[1] E.g., *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971).

dismissed for lack of complete diversity.[2] Since under § 301(b) of the National Labor Relations Act, 29 U.S.C. § 185(b), the Union is suable as an entity, the pensioners filed a new complaint alleging a breach of contract. On an appeal certified to this court pursuant to 28 U.S.C. § 1292(b) we held that nothing in the labor agreement between the Union and the coal operators obligated the Union to enforce the operators' promise to pay royalties to the Fund. Thus we concluded that the complaint, as then drafted, did not state a claim upon which relief could be granted under § 301(a) of the National Labor Relations Act.[3] Although we did not agree that the complaint stated a cause of action for breach of a labor agreement, we recognized that the allegations of failure to enforce the operators' promise might state a claim for a breach of the Union's equitable duty as a fiduciary to act in the interest of the pensioners and its employed members without unreasonable discrimination. 400 F.2d at 105. We remanded with instructions to allow plaintiffs a reasonable time to amend their complaint to state such a claim, and to join the Fund Trustees as necessary parties. We recognized that the district court would have jurisdiction over such a claim under 28 U.S.C. § 1337.[4] *Nedd* v. *United Mine Workers, supra*, 400 F.2d

[2] *Nedd* v. *United Mine Workers of America*, 225 F.Supp. 750 (E.D.Pa. 1963), *aff'd* 332 F.2d 373 (3d Cir. 1964) (per curiam).

[3] *Nedd* v. *United Mine Workers*, 400 F.2d 103 (3d Cir. 1968).

[4] That section provides:

> [t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Implicitly, we recognized that there would be § 1337 jurisdiction as well, since all § 1337 cases, save those where the amount in controversy is less than $10,000, also meet the

at 106. On remand, an amended complaint joined the Fund Trustees as defendants, and alleged jurisdiction under 28 U.S.C. § 1337 and under 29 U.S.C. §§ 157, 158 (b), 159(a), 185, 186, 301 et seq. and 501. The amended complaint alleged violations of federal law, but also included a pendent state law claim for breach of fiduciary duty. Plaintiffs demanded a jury trial. By an order dated June 30, 1970 the district court struck this demand. After protracted discovery, a non jury trial was held in June of 1974. The district court's opinion was filed on April 13, 1976.[5] It concludes:

> [t]he following are this Court's holdings in this case:
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> 1. This Court does not have subject-matter jurisdiction of plaintiffs' claims;
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> 2. However, assuming that there is jurisdiction,
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> A. the statute of limitations was tolled by the trustees' actions and does not bar this suit;
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> B. the trustees are not liable either for violation of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, or for breach of the common law duty of undivided loyalty of a trustee;
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> C. although past trustees were guilty of a breach of a trustee's duty to enforce claims by virtue of their negligent handling of the problem of operator delinquencies, none of the trustees who

requirements of 28 U.S.C. § 1331. *See Jersey Central Power & Light Co.* v. *Local Union No. 327, etc., of I.B.E.W.*, 508 F.2d 687, 699 n.34 (3d Cir. 1975), *vacated on other grounds sub nom. Equal Employment Opportunity Comm'n.* v. *Jersey Central Power & Light Co. et al.*, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976).

[5] *Nedd* v. *United Mine Workers*, Civil No. 8796 (M.D.Pa., Apr. 13, 1976).

> are defendants in this case may be held liable for that breach;
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> D. the Union is not liable under any of the theories advanced by plaintiffs; and
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> E. if the Union is liable, it is entitled to have deducted from any recovery against it an amount equal to the total sum it has loaned the Fund since its inception.
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> In accordance with the above, judgment will be entered for the defendants.

Joint Appendix at 152a.

While at first blush it would seem that the district court should have stopped after concluding it lacked subject matter jurisdiction, the actual holding appears to be a rejection of the federal claims as a matter of law after a full trial, and a rejection of the pendent state law claim on the merits as well. On appeal the pensioner plaintiffs advance several contentions. They contend that the court erred in rejecting all federal claims; that their federal claims were sufficiently substantial to support pendent jurisdiction over their state law claims; that the court erred in striking their demand for a jury trial; and that it erred in entering judgment for the defendants. The defendant Union and the defendant Fund Trustees urge that the federal claims are so insubstantial that the district court was correct in holding that it lacked subject matter jurisdiction, but that its findings that there were no breaches of fiduciary duties are not clearly erroneous and should be affirmed if there was jurisdiction.

I. FEDERAL QUESTION JURISDICTION

The amended complaint alleges three federal law theories: (1) failure to enforce a collective bargaining contract, a federal common law action implied from the

jurisdictional grant over such claims in § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a); (2) breach of the federal common law duty of fair representation; and (3) breach of fiduciary duties implied from the prohibitions of § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186. The district court, after an extended analysis, concluded that none of these theories would support federal jurisdiction and that since there was no federal question jurisdiction, it could not exercise pendent jurisdiction.[6] We conclude that in the circumstances of this case federal law causes of action of sufficient substance to support federal question jurisdiction were pleaded. Moreover, we conclude that the court could properly, as ultimately it did, try the pendent state law cause of action.

A. The § 301 Contract Claim

The § 301 claim against the Union must be considered separately from that against the Trustees. Although our prior decision in *Nedd* v. *United Mine Workers*, *supra*, discussed a § 301 claim against the Union, that opinion did not reach the issues presently before us.[7]

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[6] The court then said:

> [n]otwithstanding the jurisdictional conclusions hereinbefore articulated, in order to completely fulfill this Court's responsibilities as a trial court and to ensure a final resolution of this protracted lawsuit in the event that an appellate court determines that there is federal jurisdiction here, I will address myself to the question whether, assuming federal jurisdiction of the issues in this case, plaintiffs are entitled to relief.

[7] Our prior decision merely established that the union was not by contract obligated to enforce the royalty provisions of the Anthracite Wage Agreement. The Trustees were not then before the court, nor did we then have occasion to consider the issue of liability for destruction of bargained-for benefits.

Moreover, plaintiffs urge that our prior decision is not controlling because this court failed to consider the impact of certain relevant contractual provisions. We have examined the proffered contract, and conclude that it does not require any revision of our previous ruling with respect to the Union's contractual obligation to undertake collection of the royalties. There is no such obligation.

The § 301 claim against the Trustees is based on a provision in the 1952 interim Agreement between the Union and the operators:

> The Trustees of the Fund shall use due diligence and all reasonable means to collect and prevent delinquent obligations to the Fund.

Plaintiffs' exhibits, Vol. A, p. 67. This provision was incorporated by reference in all subsequent Anthracite Wage Agreements. The district court points out that the trustees were not parties to the contract, and therefore undertook no duties under it. It urges, moreover, that the clause is merely a statement of the trustees' fiduciary duties, and does not render those duties contractual in nature. Granted these premises, the conclusion which the district court drew, that it lacked § 301 jurisdiction, does not follow.

[1-4] The above quoted clause is a contractual recognition that the trustees have standing to sue to enforce the royalty provisions.[8] It is settled law that a suit by non-party trustees to enforce those provisions may be entertained in federal district court by virtue of § 301.[9] It is also settled law that employees, although not formally parties to a collective bargaining agreement, can bring a § 301 suit to enforce its terms. *Smith* v. *Eve-*

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[8] *See* Note, Pension Plans and the Rights of the Retired Workers, 70 Colum.L.Rev. 909, 922 n.64 (1970).

[9] *Id.*; *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960).

ning News Ass'n., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246 (1962). Where the trustee may sue and wrongfully fails to do so, the beneficiary may sue the trustee as well as the party or parties the trustee failed to sue.[10] Thus, the complaint states a non-frivolous cause of action under 29 U.S.C. § 301, which provides for suits in federal court for violation of such contracts.

[5-6] In *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 181 n.20, 92 S.Ct. 383, 398 n.20, 30 L.Ed.2d 341 (1971), while holding that an employer had no statutory duty to bargain collectively with a union representing its employees over benefits for retirees, the Court observed:

> [t]his does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col.L.Rev. 909, 916-20 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960).

[10] Note, *supra* n.8, at 992 n.64; Restatement (2d) of Trusts, § 282(2) (1959); 4 A. Corbin, Contracts, § 779A (1950). An action by a trust beneficiary is rooted in the law of trusts rather than of contracts. Yet, as Corbin points out, a suit by a trust *cestui* is essentially similar to a suit by a third party donee beneficiary. In either event, a non-party to the original instrument, who has given no consideration for the benefit afforded him, is entitled to press for performance of obligations undertaken for his benefit. Although the cause of action in the case at bench against the trustees arises from the trust relationship, it is plain that the source of the rights asserted is the collective bargaining agreement.

The federal common law of collective bargaining agreements, which grows out of 29 U.S.C. § 185(a), would permit pension trust fund beneficiaries to sue, derivatively, to enforce the mine operators' payment obligations when the trustees did not. It is but a small step further to suggest that the same federal common law of collective bargaining agreements permits a suit against the Fund Trustees, and the Union which allegedly acted in concert with them for the destruction of the value of the bargained-for and vested contract rights.[11]

[7-8] The district court held that the entire matter was referable to the state law of trusts. We think, however, that the same policy considerations which favored recognizing a uniform federal law of collective bargaining agreements apply with equal force to support the application of federal common law to the instant claim against § 302 pension fund trustees.[12] The An-

[11] See n.10 *supra*.

[12] *Cf.* Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L.Rev. 911, 930-31 (1970); Herbert, Investment Regulation and Conflicts of Interest in Employer-Managed Pension Plans, 17 B.C. Ind. & Comm'l L.Rev. 127, 147, 148 (1976) (arguing that state trust law is both inconsistent and inadequate to protect beneficiaries, and that § 302 was intended to create a federal trust law standard). Our conclusion is only that a claim of tortious interference with a collective bargaining agreement by a Fund Trustee states a non-frivolous cause of action under § 301 of the Taft-Hartley Act sufficient to support pendent jurisdiction of state law claims in federal court. That conclusion follows from two premises: first, that § 302(e) establishes a federal forum in which to try claims of a breach of fiduciary duty by a union pension fund trustee; and second, that § 301 provides a federal forum for claims of a violation of a collective bargaining

thracite Wage Agreement was a national contract. The royalty obligations, which are the sole source of Fund corpus, are entirely a creature of the federal law of labor contracts. It would advance no sound public policy to hold that liability for the destruction of those obligations by purposeful or careless nonenforcement should vary from state to state, depending upon the vagaries of the state law of trusts. We therefore disagree with the district court's conclusion that jurisdiction under § 301 was lacking.[13]

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agreement. The instant claim against the trustees partakes of both. It is essentially the same as the cause of action described in 4 A. Corbin, Contracts, § 779A, n.61 (1950). *See* n.10 *supra*. The issue before us is neither the legitimacy of such a cause of action nor the capacity of federal common law to encompass it, but rather the appropriateness of couching it in terms of § 301. As § 301 has been recognized as a source of federal common law of labor contracts since *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957), we conclude that the pensioner plaintiffs' complaint arose under 29 U.S.C. § 301 and 28 U.S.C. § 1337.

[13] The district court relied on *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968). That case held that § 301 did not give federal courts jurisdiction of a fund trustees' suit to redress a wrongful diversion of monies from the fund, where such wrongful diversion was alleged to be a violation of the collective bargaining agreement. However, we read that holding as a standing decision rather than a more general judgment on the question of a cause of action for tortious interference with contract under § 301. The First Circuit wrote:

> Appellants contend that as long as the contract is between an employer and a labor organization, "any party who claims rights thereunder may sue for breach," citing *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). In *Smith*, the Court allowed individual employees to sue employers under section 301, reasoning that restricting section 301 to "labor organizations" would stultify congressional policy in that employee claims are "to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based." *Smith*, supra at 200, 83 S.Ct. at 270.
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> *It is difficult to see how such a rationale could justify allowing third parties who are not employers, unions, or employees to bring suit under this section.* 393 F.2d at 423 (emphasis supplied).

The First Circuit failed to consider *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960), which preceded *Smith* and left no doubt of the Trustees' standing to enforce a contribution provision of a collective bargaining agreement to which they were not parties. Thus, we disagree with the First Circuit's standing conclusion, and do not feel constrained, as did the district court, to follow the First Circuit's dictum concerning the applicability of § 301 to a breach of fiduciary duty. While we certainly do not hold that *all* breaches of fiduciary duty may be redressed in an action under § 301 of the Labor Management Relations Act, sound public policy compels the conclusion that § 301 supports a federal common law cause of action for tortious interference with a collective bargaining agreement by a pension fund trustee, in violation of his fiduciary duty to the pensioners.

All that we have said with respect to the claim against the Trustees is a *fortiori* true with respect to a similar claim against the Union, which was a party to the collective bargaining agreement and which controlled the Trustees.

[14] The most recent statement of that standard is found in the Supreme Court's opinion in *Mt. Healthy School Dist.* v. *Doyle*, —— U.S. ——, ——, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977):

> . . . where an action is brought under § 1331, the catch-all

Since the district court did not consider § 301 as we have done, it had no occasion to decide whether a federal court would apply Pennsylvania legal precepts to the § 301 claim against the trustees or fashion its own rule. We will address that question later in our discussion of the merits of the claim. For our immediate purpose we merely note that judged by the standards for determining whether a federal jurisdictional allegation supports pendent jurisdiction, the § 301 claim against the trustees was sufficient.[14] The conten-

tion that there is a § 301 federal common law cause of action for the destruction of a collectively bargained-for contract obligation is not foreclosed by prior case law and is not frivolous. *Cf. Crawford* v. *Cianciulli*, 357 F.Supp. 357, 367 (E.D. Pa. 1973).

B. Duty of Fair Representation

[9] The district court has jurisdiction under §§ 1331 and 1337 over a claimed breach of the duty of fair representation.[15] In *Nedd* v. *United Mine Workers of America*, *supra*, 400 F.2d at 105, this Court noted that the conduct attributed to the union

> [m]ay well constitute a breach of the union's equitable duty as a fiduciary representative of employees to act in their interest, fairly and in good faith, and without discrimination throughout the area in which it has been impowered to function.

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federal question provision requiring $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . ." *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *Montana-Dakota Utilities* v. *Public Services Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

The federal standard of substantiality is also set forth at length in *Hagans* v. *Levine*, 415 U.S. 528, 536-38, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). *See especially* 415 U.S. at 538, 94 S.Ct. at 1379, where the Court, quoting prior authority, held that

> [a] claim is insubstantial only if "'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'"

[15] *E.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Nedd* v. *United Mine Workers*, *supra*, 400 F.2d at 106; *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87, 94 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048, 89 S.Ct. 680, 21 L.Ed.2d 691 (1969).

Since we remanded for the purpose of considering the claim that the Union may have breached its duty of fair representation, it would be difficult to say that such a federal claim was so patently groundless that it would not support pendant jurisdiction, unless developments subsequent to our last opinion rendered it so.

The subsequent development relied on by the district court is the Supreme Court's decision in *Chemical Workers* v. *Pittsburgh Plate Glass*, *supra*. In that case the Court held: (1) that retirees were not members of a collective bargaining unit, and that their benefits were not a mandatory subject of collective bargaining within the meaning of § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d); and (2) that an employer did not commit an unfair labor practice by making a unilateral change in retiree benefits. As the Court wrote:

> "[t]he remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, see n. 20, *supra*, not in an unfair-labor-practice proceeding." 404 U.S. at 188, 92 S.Ct. at 402.

Chemical Workers v. *Pittsburgh Plate Glass*, *supra*, does not deal explicitly with the question for the decision of which we remanded when this case was before us in 1968.

[10, 11] The district court concluded that *Chemical Workers* implicitly controlled, by holding that retirees were not members of the bargaining unit for purposes of mandatory collective bargaining. The duty of fair representation, it held, extends only to members of the bargaining unit. But in *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952) the Court held that the duty of fair representation prevented a union from discriminating on the basis of race in the collective bargaining process against employees

who were *not* members of the bargaining unit the union represented. *See generally* Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L.Rev. 911, 913-14 (1970). In *Chemical Workers* v. *Pittsburgh Plate Glass, supra,* 404 U.S. at 181, n. 20, 92 S.Ct. at 398, Justice Brennan said:

> "[n]othing in *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952), is to the contrary. In *Howard* we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The reach and rationale of *Howard* are a matter of some conjecture. See Cox, The Duty of Fair Representation, 2 Vill.L.Rev. 151, 157-159 (1957). But whatever its theory the case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent."

This footnote reference plainly preserves *Howard.* While *Chemical Workers* v. *Pittsburgh Glass* held that future retirees benefits were not the subject of mandatory collective bargaining, it also recognized that such benefits were a permissive subject of bargaining. When the Union elects to undertake such bargaining, the union's duty of fair representation must apply. It is hardly conceivable that a union could discriminate among retirees on the basis of race, religion, or sex, for example. Moreover, *Chemical Workers, supra,* deals with bargaining over future retiree benefits. It does not deal with the Union's duty when it unilaterally undertakes, as the Mineworkers' Union undertook, to act as collector and enforcer of the Fund's contractual royalty entitlement. The Union need not have done so,

and if it had not, the pensioners would have had a remedy against the employers for any delinquencies. *Chemical Workers, supra,* 404 U.S. at 181 n. 20, 92 S.Ct. 383. But having undertaken, on behalf of the Fund, to enforce the employers' obligation to pay royalties, the Union was not then entitled to act in a manner which discriminated against the pensioners.

[12] The district court reasoned that ". . . federal labor policy does not necessarily require that a union which acts as the exclusive bargaining agent for retirees be held to the statutory duty of fair representation." Joint Appendix at 80a. Federal labor policy does not "necessarily" require the recognition of a duty of fair representation at all. But federal common law implied from the statutory authority conferred upon collective bargaining representatives has recognized the need to place limitations upon the power of the recognized bargaining representative to injure minorities inside and outside the bargaining unit. We do not read *Chemical Workers* v. *Pittsburgh Plate Glass, supra,* as overruling what this court said in *Nedd* v. *United Mine Workers, supra.* The allegation, that the Union's actual and voluntary participation in non-enforcement of the obligation to pay royalties violated a federal law duty of fair representation, states a not substantial claim over which the court had § 1331 and § 1337 jurisdiction. That sufficed for purposes of pendent jurisdiction over the state law issues. As with the § 301 claim, we defer to our discussion of the merits the substance of the federal law cause of action.

C. The § 302 Claim of Breach of Fiduciay Duty

[13] The Labor Management Relations Act of 1947 was inspired in part by the very Fund in issue in this case. Section 302 of the Act contains a broad prohibition against payments from employers to representa-

tives of employees.[16] Because this broad prohibition

[16] Section 302(a), (b), 29 U.S.C. § 186(a), (b) provides:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

would prevent payments to a union pension or welfare fund, § 302(c)(5) contains an exception for such funds. That subsection also provides, however, that employees and employers be equally represented in their administration.[17] The pensioners contend that for many

[17] Section 302(c)(5), 29 U.S.C. § 186(c)(5) provides:
(c) The provisions of this section shall not be applicable

* * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the

years during which the mine operator delinquencies were permitted to accumulate there was what is commonly referred to as a "structural" violation of § 302(c)(5), in that the union-designated trustees were a majority. The pensioners urge that this "structural" violation gives rise to a federal common law cause of action [18] for breaches of fiduciary duties which were made possible by the fact of union domination. The § 302(c)(5) claim was added by amendment following our remand in *Nedd* v. *United Mine Workers, supra.* By that time the structural violation of § 302(c)(5) had been corrected, but the court permitted the amendment. The defendants do not dispute that this was an amendment which, under Fed.R.Civ.P. 15(c), could properly relate back to the filing of the § 301 complaint in 1965. Nor could they, since the predicate for the

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purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

[18] An allegation of "structural violations" is sufficient to vest jurisdiction under 29 U.S.C. § 186 and 28 U.S.C. § 1337. *Lugo* v. *Emp. Retire. Fund*, 529 F.2d 251, 254-56 (2d Cir. 1976). *Johnson* v. *Botica*, 537 F.2d 930, 933 (7th Cir. 1976). *Compare Giordani* v. *Hoffmann*, 295 F.Supp. 463, 471-72 (E.D.Pa. 1969) (allegation of § 302(c) violation sufficient to create jurisdiction) *with Bowers* v. *Ulpiano Casal, Inc., supra*, 393 F.2d at 426 (jurisdiction lacking where complaint failed to allege a violation of § 302(c)(5) standards). Clearly, the amended complaint was sufficient to withstand a motion to dismiss under Fed.R.Civ.P. 12 (b)(1). *See* n. 14, *supra.*

However, *Tully* v. *Mott Supermarkets*, 540 F.2d 187, 196 (3d Cir. 1976), requires us, where the existence of pendent jurisdiction is at issue, to examine the cause of action and to determine whether it can withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6). For it is an abuse of discretion for a district court to exercise pendent jurisdiction where the federal claim is frivolous. *Id. See also Johnson* v. *Botica, supra*, 537 F.2d at 933 n. 2.

pensioners' claims is common to the to the several theories advanced in support of federal question jurisdiction, including the § 302(c)(5) theory. See 3 J. Moore, Federal Practice ¶ 15.15[3], pp. 1027-1031 (1974). Rather, they contend that a Rule 12(b)(6) motion on the § 302(c)(5) claim for money damages should so clearly have been granted that the assertion of such a claim is insufficient to support pendent jurisdiction. The district court agreed. We do not.

Many courts which have considered whether there can be a federal cause of action for money damages growing out of a structural violation of § 302 have taken as their point of departure the language of § 302(e): [19]

> "[t]he district courts of the United States . . . shall have jurisdiction for cause shown . . . to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title."

Courts have differed on the question whether this section confers jurisdiction over all cases concerning § 302 pension plans, or limits jurisdiction to suits for injunctive relief against structural deficiencies which violate

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[19] Some courts have taken a narrow view of § 302(e). *E.g., Bowers v. Moreno*, 520 F.2d 843, 846 (1st Cir. 1975); *Snider v. All State Administrators*, 481 F.2d 387, 390 (5th Cir. 1973), *cert. denied*, 415 U.S. 957, 94 S.Ct. 1484, 39 L.Ed.2d 571 (1974). Others, most notably the district courts of this Circuit, have read that section less restrictively. *E.g., Porter v. Teamsters, etc. Funds*, 321 F.Supp. 101, 104 (E.D.Pa. 1970); *Giordani v. Hoffman*, 295 F.Supp. 463, 472 & n. 3 (E.D.Pa.1969); *Raymond v. Hoffmann*, 284 F.Supp. 596, 601-02 (E.D.Pa.1966).

the "sole and exclusive benefit" provisions of § 302(c)(5).[20]

We are not convinced, however, that § 302(e) is, for jurisdictional purposes, the appropriate starting point. The subsection uses the language "shall have jurisdiction," but the usage must be read in conjunction with the cross references to the anti-injunction provisions of the Clayton Act [21] and the Norris-LaGuardia Act.[22] The latter, in particular, is couched in terms of a lack of jurisdiction to issue an injunction. 29 U.S.C. § 101. It seems likely that no more was intended by § 302(e) than to remove, in the context of enforcement of § 302, the bar of the anti-injunction statutes to which reference was made.[23] That, certainly, was the explanation of Senator Ball, who introduced § 302 as an amend-

[20] See n. 19, *supra*.

[21] Act of October 15, 1914, c. 323, §§ 6, 20, 38 Stat. 731, 738 (1914), 15 U.S.C. § 17, 29 U.S.C. § 52.

[22] Act of March 23, 1932, c. 90, 47 Stat. 70-73 (1932), as amended, 29 U.S.C. §§ 101-110, 113-115.

[23] *See Moses* v. *Ammond*, 162 F.Supp. 866, 869-70 (S.D.N.Y. 1958):

> I do not believe that 29 U.S.C.A. § 186(e), in itself, vests any jurisdiction in the District Courts. Such an interpretation would be possible if the subsection . . . ended after the words "restrain violations of this section." But the subsection as a whole indicates, I believe, that its purpose was to remove the bar of sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738 (1914), 15 U.S.C.A. § 17, 29 U.S.C.A. § 52, and the bar of the Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C.A. §§ 101-110, 113-115, so as to permit the courts of the United States, in cases in which jurisdiction was otherwise present, to enjoin violations of subsections (a) and (b) of 29 U.S.C.A. § 186.

See also Note, 72 Harv.L.Rev. 778 (1959).

ment during the consideration of the Labor Management Relations Act.[24]

If one looks upon § 302(e) as the removal of a bar to injunctive relief, rather than as an affirmative grant of jurisdiction, then two things become plain. The first is that civil suits in federal courts were contemplated by § 302, and that some federal law would have to govern such suits in order to meet Article III jurisdictional requirements. The second is that jurisdiction was assumed to exist, rather than granted.

[14] The problem, then, is not unlike that considered in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), in which the Court undertook to determine what Congress meant by the language in § 301.

> "[S]uits for violation of contracts . . . may be brought in any district court of the United States having jurisdiction of the parties, . . . without regard to the citizenship of the parties."

The Court found in that provision authority to fashion federal common law. 353 U.S. at 456, 77 S.Ct. 912. As to jurisdiction, however:

> "Title 28 U.S.C. § 1337 says that 'The district courts shall have original jurisdiction of any action or proceeding arising under any act of Congress regulating commerce . . . ' It is that original jurisdiction that a § 301 action invokes." *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 561-62, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968).

[24] Senator Ball stated:
"[s]ubsection (e) gives the district courts jurisdiction to restrain and to punish violations of the section, notwithstanding the provisions of the Norris-LaGuardia Act." 93 Cong.Rec. 4678 (1947).

It is the jurisdiction conferred in §§ 1331 and 1337 that is invoked by the allegation of a federal common law cause of action implied from the provisions of § 302(c)(5).[25]

[15] In determining whether such a cause of action may be implied, and for what purposes, we must look for guidance to such recent Supreme Court pronouncements as *Santa Fe Industries* v. *Green*, —— U.S. ——, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977), *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974). In *Cort* v. *Ash*, *supra*, Justice Brennan summarized:

> "In determing whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . —that is, does the statute create a federal right in favor of the plaintiff?

[25] The defendants place great reliance on Justice Stewart's statement in *Arroyo* v. *United States*, 359 U.S. 419, 427, 79 S.Ct. 864, 869, 3 L.Ed.2d 915 (1959) that "[t]he legislative history [of § 302] is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." *Arroyo* was an appeal from a federal criminal conviction of an employer representative who embezzled welfare funds. The quoted language is simply a rejection of the contention that § 302 is the source of a federal common law crime not expressly defined by statute. Since it is well established that there are no federal common law crimes, and that all federal crimes are defined by statute, Justice Stewart's observation is simply inapposite to the question presently before us.

> Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based on federal law?" 422 U.S. at 78, 95 S.Ct. at 2087 (emphasis in original).

Appellants argue that the Fund's monetary loss was due to Union domination, in violation of § 302(c)(5), and claim entitlement to a money judgment by virtue of that section. Applying the four-pronged test of *Cort* v. *Ash*, we think their complaint states a cause of action properly implied from § 302. First, the fund beneficiaries are the class for whose especial benefit § 302(c)(5) was enacted.[26] Second, there is a clear indica-

[26] When an early draft of the Labor Management Relations Act of 1947 was reported out of committee, it lacked § 302. In fact, section 8(a)(2)(C)(ii) of that bill made it an unfair labor practice for an employer to contribute to *any* union fund or trust. *See* H.R.3020, 80th Cong., 1st Sess., § 8(a)(2)(C)(ii), *reprinted* in NLRB, Legislative History of the Labor Management Relations Act of 1947, pp. 50-51 (1948) (hereinafter referred to as "Leg.Hist.") Section 302 did not appear until the passage by the Senate of the Ball Amendment, cosponsored by Sens. Ball, Byrd, George and Smith. The statements by § 302's supporters make plain the purpose of that section:

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute them, and that they shall not degenerate into bribes." 93 Cong. Rec. 4805 (1947), Leg.Hist. at 1302 (Remarks of Sen. Ball).

* * * * *

tion in § 302(e) that civil remedies for enforcement would be recognized.[27] Since *some* federal civil actions would be recognized, Congress obviously assumed that the federal courts would fashion both remedial and substantive rules of law for their disposition. Nothing in either the text of § 302 or in its legislative history suggests any hostility to damage remedies. Third, the recognition of private enforcement is entirely consistent

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"The purpose of the amendment is to require that the fund shall be established in definite, detailed form . . . [t]he purpose is to prevent the abuse of welfare funds. . . . Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages." 93 Cong.Rec. 4876-77 (1947), Leg.Hist. at 1310-13 (Remarks of Sen. Taft).

* * * * *

"Mr. President all seek to do by the amendment is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled. 93 Cong.Rec. 4883 (1947), Leg.Hist. at 1322 (Remarks of Sen. Ball).

It is beyond question that § 302 was enacted for the "especial benefit" of the beneficiaries of union welfare and pension funds. The chief protection Congress sought to provide was protection from exploitation of the fund by Union officials for improper purposes. *See, e.g., Arroyo* v. *United States, supra*, 359 U.S. at 425-26, 79 S.Ct. 864; *United States* v. *Ryan*, 350 U.S. 299, 304-06, 76 S.Ct. 400, 100 L.Ed. 335 (1956); *Alvares* v. *Erickson*, 514 F.2d 156, 164 (9th Cir. 1975); *Bowers* v. *Ulpiano Casal. supra*, 393 F.2d at 425; 2 U.S.Code Cong. & Admin. News, pp. 2326-31 (1959) (LMRA) amendments to § 302 of LMRA); 1 U.S. Code Cong. & Admin. News pp. 1159-60 (1969) (P.L. 91-86, amending § 302(c)).

[27] See pp. 201-203 and nn. 19, 23 & 24, *supra*.

with the underlying legislative scheme. In contrast with the statute considered in *Cort* v. *Ash, supra*, we are dealing with more than a bare criminal statute.[28] In contrast with that considered in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers, supra*, we are not dealing with a statute naming specific prospective plaintiffs. In contrast with *Securities Investor Protection Corp.* v. *Barbour, supra*, recognition of an implied private action for recovery of money can in no way conflict with enforcement efforts intrusted to a public agency. Recognition of a derivative cause of action for the recovery of money for the trust is consistent with the overall statutory purpose of § 302(c)(5)—the preservation of the trust corpus for its intended beneficiaries. Fourth, while the duties of fiduciaries has traditionally been a matter of concern of the States, collective bargaining agreements, at least in the private sector,[29] have since 1947 been of federal concern. While the Fund is nominally a trust created under state law, it is a unique kind of trust, the corpus of which is the fruit of collective bargaining agreements.[30] The very enactment of § 302(c)(5)

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[28] Section 302(d) addresses criminal violations, but § 302(e) plainly contemplates enforcement by means other than indictment. Moreover, § 302(e) is not limited, by terms, to § 302(c)(5) violations, and would appear to apply with equal force to § 302(a) and (b). We will not endorse a federal law of remedies that would prohibit a court, properly entering a restraining order, from awarding damages incidental to equitable relief. *But cf. Arroyo* v. *United States, supra*, 359 U.S. at 424, 79 S.Ct. 864; Goetz, Employee Benefit Trusts Under Section 302 of the Labor Management Relations Act, 59 N.W.U.L.Rev. 719, 720 (1965) (§ 302 a "criminal statute").

[29] Section 302 does not apply to public employee unions. *See Crilly* v. *SEPTA*, 529 F.2d 1355 (3d Cir. 1976).

[30] The Fund exists as a hybrid creature of both state and federal law. It was chartered and achieved entity status under state law. Federal labor law both sanctions the bargaining

shows that Congress was not satisfied to leave protection of these bargained-for benefits entirely to the state law of trusts.

[16] That does not necessarily mean that Congress has preempted all state law with respect to the fiduciary obligations of welfare fund trustees. Such a construction of the statute is possible. *Cf. Teamsters Local* v. *Lucas Flour*, 369 U.S. 95, 102-04, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). Another construction might result in the establishment of federal minimums for fiduciary conduct with state law remaining operative when it imposed higher obligations.[31] Most of the federal

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process, the very genesis of the Fund, and prescribes the structure and purpose of the Fund. As noted above, *supra*, n. 10, the laws of both trusts and labor contracts are relevant to a section 302 fund. *See also Goetz*, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L.Rev. 911, 926 (1970). But to conclude that because state law traditionally governs trusts no federal cause of action may be implied from § 302 is to say that state law preempts federal law where both apply to a subject of federal legislation. Without a Congressional statement of intent to arrive at that accommodation, such a conclusion is insupportable.

[31] Although we need not decide the question, it seems plain that the proper conclusion is that federal law should preempt all state law inconsistent with the federal common law standards for fiduciary conduct by union pension fund trustees. *See, e.g.*, Employee Retirement Income Security Act of 1974, 88 Stat. 829 *et seq.*, 93d Cong., 2d Sess. (1974). Section 514(a) of the Act, 29 U.S.C. § 1144(a) provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

This subsection mandates federal supremacy of Part IV of Subchapter I, dealing with trustees' fiduciary duties, over inconsistent state laws. That Part, §§ 401-414 of the Act, 29

courts which have considered the availability of private federal law causes of action implied from § 302(c)(5) have suggested a fairly narrow area in which

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U.S.C. §§ 1101-1114, states the basic rules of federal fiduciary duty in § 404, 29 U.S.C. § 1104, which provides:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.
>
> (2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).
>
> (b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.
>
> (c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
>
> (1) such participant or beneficairy shall not be deemed to be a fiduciary by reason of such exercise, and
>
> (2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach,

such law might operate.[32] They have drawn the line between actions involving structural deficiencies in the fund administration or provisions, and ordinary breaches of fiduciary duties by trustees of a Fund conforming with § 302(c)(5). Since this case involves a structural deficiency claim, we need only consider whether federal law provides a derivative damage remedy for that claim against the Trustees, the Union, or both. We agree with the courts which have held that a pleading which alleges such a claim is sufficiently non-frivolous to vest federal question jurisdiction. Moreover, we hold that such a claim could not be dismissed on a Rule 12(b)(6) motion that it was not appropriate, on this record, for summary judgment, and that it was properly disposed of only after a hearing.

[17] Although the district court concluded that it lacked subject matter jurisdiction, it did so only after

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which results from such participant's or beneficiary's exercise of control.

The heart of this provision is § 1104(a)(1)(B), which establishes a "prudent man" standard. This rule, which supersedes all inconsistent state law, is no different from, nor more explicit than, the federal fiduciary duty under § 302 of the Taft-Hartley Act. Indeed, ERISA has been criticized for that reason. *See*, Herbert, Investment Regulation and Conflicts of Interest in Employer-Managed Pension Plans, 17 B.C. Ind. & Com. L.Rev. 127, 148, 157 (1976).

Section 514 of ERISA, 29 U.S.C. § 1144, plainly indicates that it does not govern the suit presently before us. Any fiduciary duties applicable to the present case must be fashioned from federal common law under § 302. But Congress' plain intent to apply the § 302 standard preemptively in Subchapter I, Part 4 of ERISA, guides us to a like conclusion for § 302 common law. *See* Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 226-27 (1934) (a legislative establishment of policy sometimes carries significance beyond the particular scope of the statute involved).

[32] *See* cases cited in n. 19, *supra*: *See also Goetz, supra* n. 30, at 926-929.

the case was fully litigated. Since we have held that non-frivolous federal causes of action were pleaded which support jurisdiction under 28 U.S.C. §§ 1331 and 1337, the court properly tried the pendent state law claims as well. We therefore proceed to the merits of the appeal.

III. THE JURY TRIAL CONTENTION

The pensioners' complaint made a timely demand for a jury trial. The defendants moved pursuant to Fed. R.Civ.P. 39(a)(2) to strike that demand, contending that the action, whether based on federal or state law, was essentially an equitable one, unknown at common law. The district court granted the defendants' motion, and the case was tried by the court sitting without a jury. The pensioners contend this was error. They urge that the suit is essentially one for the recovery of money, and that such a suit, regardless of the source of the law which creates the cause of action, is an action at law within the meaning of the seventh amendment. That is true of suits in which the plaintiff seeks the recovery of money for himself.[33] *Curtis* v. *Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). But in this case what is sought, whether the source of the action is federal law or state law, is recovery not for the plaintiffs, but derivatively, for the Fund. *Ross* v. *Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), held that a corporate share-

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[33] In *Brady* v. *Trans World Airlines, Inc.*, 196 F.Supp. 504, 507 (D.Del. 1961) the court in dicta suggested that causes of action implied from federal statutes, being unknown at common law, did not require a jury trial. This court somewhat cryptically approved that suggestion. 401 F.2d 87, 96 n. 32. *Curtis* v. *Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), would seem to have overruled any doctrine that new statutory remedies are outside the reach of the seventh amendment. *Id.* at 193-94, 94 S.Ct. 1005.

holder's derivative action was entitled to a jury trial when, if the same action had been brought to the corporation on whose behalf recovery is sought, it would have been denominated "legal," rather than "equitable." A trust, however, is not a corporation.

[18, 19] The district court held, and we agree, that the suit against the Trustees under Pennsylvania law was essentially a suit for an accounting of their stewardship, and thus essentially equitable. *See* III Scott on Trusts § 197.1, p. 1627 (3d ed. 1967); American Law Institute, Restatement of Trusts (Second), § 197 and Comment b (1959). The federal law claims against the Trustees are similar in nature. Regardless of their statutory source, the relief sought by the beneficiaries to have the Trustees account to the Fund for their breach of duty in neglecting to enforce claims belonging to it.

[20] The various claims against the Unions are also essentially equitable. Regardless of the source of the cause of action, the suit is by trust beneficiaries and seeks recovery for the trust.

> "The beneficiaries of a trust cannot maintain an action at law against a third person who commits a tort or other wrong with respect to the trust property, although a beneficiary in possession of the subject matter of the trust can maintain such actions at law as are permissible to one in possession. The interest of the beneficiary is an equitable interest and ordinarily is protected by suits in equity rather than by actions at law. We have seen that the ordinary remedy of the beneficiary against the trustee is in equity, and that the beneficiary can maintain an action at law against the trustee only where the trust is essentially a passive trust. So also, insofar as the beneficiary is entitled to maintain an action against a third person acting adversely to the trustee, his remedy is in equity." IV Scott on Trusts § 281, p. 2332 (3d ed. 1967) (Citations omitted).

See Langdon v. *Sherwood*, 124 U.S. 74, 8 S.Ct. 429, 31 L.Ed. 344 (1888); *Lessee of Smith* v. *McCann*, 65 U.S. (24 How.) 398, 16 L.Ed. 714 (1860); *Fenn* v. *Holme*, 62 U.S. (21 How.) 481, 16 L.Ed. 198 (1858). Neither *Curtis* v. *Loether*, *supra*, nor *Ross* v. *Bernhard*, *supra*, cast any doubt upon the continued authority of the rule that the remedies of trust beneficiaries, against trustees or third parties, are equitable rather than legal. That the liability of either or both may be a matter of federal rather than state law has no bearing on the seventh amendment issue. The district court properly held that the pensioners were not entitled to a jury trial.

IV. THE MERITS

In discussing the merits of this case the district court considered the defendants' liability on all the legal theories asserted by plaintiffs except that based on § 301. As to that claim it relied on its jurisdictional determination, with which we disagree. However, any § 301 cause of action for the destruction of the value of the contractual right to royalties would, in the instant case, require no different factual findings than those required for the fair representation or § 302 claims. We therefore treat the district court's discussion as if it disposed of all claims under federal and state law.

[21] The district court found that in the years 1948 through 1967 two of the three trustees of the Fund were Union members and officers. Section 302(c)(5)(B) of the Taft-Hartley Act, 28 U.S.C. § 186(c)(5)(B) requires that for a Fund to be a lawful recipient of monies paid by, e.g., an employer, that Fund must meet certain requirements. Among them is the requirement that

> "employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . . ."

Since the trustees were dominated by Union representatives, the district court correctly concluded that during all those years the Fund was in violation of § 302(c)(5). It also found that by December 1, 1954, the first year for which figures are available, 46 companies were delinquent in an amount of almost $2,500,000. By 1962 the delinquency of 120 companies totalled $12,000,000. It is the bulk of these delinquencies which remains uncollected. The trustees filed some 30 lawsuits against 26 delinquent operators during the period 1954-1962, but the district court found:

> "On the whole, these suits were not pursued vigorously and were largely ineffectual in collecting over-due amounts." Joint Appendix at 45a.

Trustee activity increased after 1962. The Court found:

> "A substantial contributing factor in the increase in trustee activity during this time was the formation of the Panther Valley Protest Committee in June, 1961, and the retention of Counsel by the Committee in August, 1962."

The Fund retained Charles A. Shea as special counsel in January 1962. He noted that the Fund was in violation of § 302(c)(5), and advised that the structural defects be corrected. One defect existed because Trustee Brennan, designated as a "neutral" trustee, was actually a union officer. The Court found:

> "Brennan, however, refused to resign as trustee until February, 1967. The Agreement itself was not amended to insure conformity with Section 302 until 1966." Joint Appendix at 47a.

The Court also found that in January 1954 the trustees, in announcing to the pensioners a reduction in pension payments, misrepresented to them that the Fund predicament was attributable solely to a decline in coal production, while failing to disclose the extent of mine operator delinquencies. Joint Appendix at 89a. A similar misrepresentation and nondisclosure occurred when pensions were again reduced in June, 1958. Joint Appendix at 90a. When the existence of delinquencies became public knowledge, the Court found, a Trustee issued public statements which misrepresented both the seriousness of the problem and the extent of the trustees' efforts to keep payments current:

> "Particularly because the trustees were fiduciaries in whom the pensioners were expected to and did repose their trust and confidence and the pensioners had been given no cause to suspect the trustees representation of the Fund's financial situation, the inevitable effect of the statements of the 1950's was to prevent the pensioners from making any inquiries on their own into the Fund's financial condition." Joint Appendix at 91a-92a.

The Court also found "that the union did not join with the trustees in preventing the pensioners from learning the facts about operator delinquencies sooner than December, 1961." Joint Appendix at 92a. It declined to attribute to the unions the actions of union officers Brennan and Kennedy who were trustees. But it also found:

> "The record reveals little direct activity by the trustees with respect to delinquencies during the years 1962 and 1963. This was probably because most of the activity [with respect to delinquencies] on behalf of the Fund during those years was conducted by the Union." Joint Appendix at 48a.

* * * * *

"As mentioned, *supra*, the Union has been intimately involved with the affairs of the Fund since its inception in 1946." Joint Appendix at 51a.

* * * * *

"Furthermore, a close relationship between the Union and the Fund was perhaps inevitable because of the manner in which the Fund has been organized. At most times relevant to this suit, two of the Fund's three trustees were Union officers.[11]

[11] At the time of his appointment as a trustee, Thomas Kennedy was Secretary-Treasurer of the Union. He continued to serve as a trustee of the Fund until his death in 1963, at which time he was President of the Union. John O'Leary was Vice President of the Union at the time he was made a trustee, and Mart F. Brennan was President of District 7, UMW at the time of his appointment. In addition Brennan later became a member of the International Executive Board of the Union, and served in that capacity during almost 10 of the years he was a trustee. During his years as a trustee, Emmitt Thomas was Special Representative for Anthracite Affairs for the International Union, UMW, and from 1948 through 1962, he was Executive Assistant to the President of the Union. He also was a member of the International Executive Board of the Union during some of the years that he was a trustee. Nicholas Haydock was not a Union official and had no prior association with the industry.

Joint Appendix at 52a.

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"... [t]here is no instance reflected in the record of this case of the two Union trustees casting disparate votes during their management of the fund, and the record refers to at least one occasion on which the two Union trustees expressed concern about whether actions taken on behalf of the Fund could be taken by two of the three trustees in order to avoid having the Fund, in effect, ruled by the Operator trustee.

The most significant Union involvement in the affairs of the Fund, aside from participation of Union officials as trustees, has been its attempts to enforce the operators' duty to make royalty payments and its efforts to collect delinquencies."

* * * * *

"In view of the numerous instances of Union attempts to collect delinquencies reflected in the record, as well as the scant evidence of direct communication between the trustees and the operators concerning delinquencies, it is fair to conclude that the trustees looked to the Union to furnish most of the effort with respect to enforcement of the operators' agreement to contribute to the Fund and collection of delinquencies, and that the Union unhesitatingly accepted this responsibility." Joint Appendix at 53a-54a (footnote omitted).

* * * * *

"Besides the above-described instances of significant Union involvement with the Fund, there have been numerous occasions of less significant Union participation in the Fund's affairs. One of these was the transfer of $205,000 of the Fund's monies to the National Bank of Washington, D.C., a union controlled bank, in December of 1962." Joint Appendix at 57a.

* * * * *

"Another instance of Union involvement in the Fund's affairs was the transfer, in May of 1963, of the Fund's offices from the Markle Banking and Trust Company Building in Hazleton, Pennsylvania, to the United Mine Workers Building in the same city.

* * * * *

"On seven occasions, the trustees held their regu-

larly scheduled Fund meetings in the UMW offices in Washington, D.C. rather than at the Fund headquarters. To be eligible to receive a pension from the Fund, a retired miner had to remain a member in good standing of the Union during the period he received a pension, which included paying dues of $1 per month to the Union." Joint Appendix at 58a-59a.

[22, 23] The foregoing findings of fact, which are amply supported by the evidence, establish beyond dispute that the Union by virtue of the § 302(c)(5) equal representation violation, placed itself in the position of the Trustees for all practical purposes with respect to the enforcement of the royalty obligations of the mine operators. Whether one looks to the Pennsylvania law of trusts or to an appropriate federal standard created under any of the three federal legal theories asserted by the plaintiffs the Union must, in the circumstances of this case, be held to the same standard of conduct in discharging its assumed obligations toward the Fund as that of the Fund's nominal Trustees. The Union argues that the concept of "de facto" trustee is one unknown to Pennsylvania law. But we decline to turn the result on labels. The concept of liability for knowing participation in a breach of trust is well recognized.[34] Moreover, the district court found

[34] *E.g., Hammonds* v. *Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 803 (N.D. Ohio 1965); *In Re Van Sweringen Co.*, 119 F.2d 231, 234 (6th Cir. 1941); *Food Fair Stores, Inc.* v. *Greeley*, 264 Md. 105, 285 A.2d 632 (1972); *Shuster* v. *North American Mortgage Loan Co.*, 139 Ohio St. 315, 40 N.E.2d 130 (1942); *Proctor* v. *Norris*, 285 Mass. 161, 188 N.E. 625 (1934); *Anderson* v. *Daley*, 38 App. Div. 505, 56 N.Y. Supp. 511 (1899), *appeal dismissed*, 159 N.Y. 146, 53 N.E. 753 (1899); IV Scott on Trusts § 326.5, p. 2570 (3d ed. 1967); American Law Institute, Restatement (Second) of Trusts § 326 (1959); Annotation, Employer's Liability for Action of Trustee or Similar Body Administering Employer's Pension Plan, 54 A.L.R.3d 189, 191 (1973); Scott, Participation in Breach of Trust, 38 Trust Bull. 41 (Dec. 1958). *Cf. Carroll* v. *Brotherhood of Railroad Trainmen*, 417 F.2d 1025, 1028 (1st Cir. 1969) (recognizing rule of § 326 of Restatement 2d); *Chester-Cambridge Bank & Trust Co.* v. *Rhodes*, 346 Pa. 427, 433-34, 31 A.2d 128, 132 (1943) (acknowledging rule as stated by Scott and Restatement, but declining to find liability against third parties who lacked knowledge of breach of fiduciary duty).

that the Union undertook the task that the trustees should have been performing. Clearly it had full knowledge of their inactivity since at all times two of the three trustees were its high officers. Because it never freed the Fund from its domination, despite the clear command of § 302(c)(5), it was in the position of controlling the extent of the Fund's efforts to collect the royalty payments. In that position, as the district court found, it undertook the task. It cannot now say that its efforts should be measured by less than a fiduciary standard. And in examining the evidence of those efforts we may not lose sight of the fact that the Union, by continuing to dominate the Fund in violation of § 302(c)(5), placed itself in a position of inherent conflict between its fiduciary obligation to the Fund beneficiaries and its duties toward the working miners whose jobs might be imperiled by vigorous enforcement.

[24] The pensioners point out that the Trustees persisted in a policy of inadequate enforcement. In particular, they failed to vigorously prosecute lawsuits against delinquent operators, all to the benefit of working Union members. They also point to record evidence indicating that the trustees were less active in pursuing the delinquencies of some operators than of others. As to the first contention, the District Court, acknowledging that public statements by the trustees estab-

lished their interest in keeping working mines open, concluded:

> ". . . *the statements themselves do not support plaintiffs' position* that the policy of avoiding the closing down of delinquent operators for the purpose of promoting the Union's interest in not harming working miners." Joint Appendix at 104a (emphasis supplied).

As to selective non-enforcement, the district court, acknowledging that failure to pursue three major producers evidenced a lack of due diligence, reasoned:

> ". . . no explanation for this apparently disparate treatment is suggested by the evidence in this case. For example, there is no evidence of any arrangements, sweetheart deals or kickbacks between the trustees and any operators. There is not even an indication that the trustees deliberately decided to treat some operators differently than others. *In the absence of any such evidence*, I am unwilling to find that the discrepancies in the trustees' treatment of delinquent operators were either intentional, motivated by some improper purpose, or beneficial to the Union. Id. at 104a-105a (emphasis supplied).

The italicized portions of the two quotations disclose the critical error in the district court's approach to the case. The pensioners established that the Union Trustees, in illegal domination of the Fund, were in a position of conflicting loyalties, and that in that position they pursued a policy which prima facie benefitted one group to the detriment of another.[35] At that point the burden of explanation or justification should properly have shifted to the fiduciaries.[36] Instead the

[35] *See* Joint Appendix at 104a-105a.

[36] Although this is a federal common law rule of union pension fund trustees' fiduciary duty, we think it is consistent with state law as well. *See, e.g., Estate of Stetson*, 463 Pa. 64, 84, 345 A.2d 679, 690 (1975); *Branch* v. *White*, 99 N.J. Super. 295, 313, 239 A.2d 665, 674, *cert. denied*, 51 N.J. 464, 242 A.2d 13 (1968). *Cf.* American Law Institute, Restatement (Second) of Trusts § 212(4) (1959).

court charged the pensioners with the failure to prove an evil intention.

[25] The District Court justified its approach of requiring the pensioners to prove evil motive by relying on the Pennsylvania rule that those who seek to surcharge a fiduciary for a breach of trust must bear the burden of proving the particulars of his wrongful conduct. Entirely apart from the question whether that is the appropriate standard to apply to fiduciaries in control of a union pension fund in violation of federal law, we think the Pennsylvania authorities relied on do not support the court's result. *In re Flagg's Estate*, 365 Pa. 82, 88-89, 73 A.2d 411, 416 (1950) holds no more than that a testator can appoint a trustee of a testamentary trust who by virtue of another position may have divided loyalties. It merely reversed a ruling of automatic disqualification. *Landis Trust*, 382 Pa. 486, 115 A.2d 167 (1955) indicates that the beneficiaries may consent to a trustee, who is also a creditor of some beneficiaries, making loans on collateral from the trust. It holds that if they consent, they must show that the trustee acted with respect to the collateral in bad faith, if they are to surcharge the trustee. The more appropriate authority is *Estate of Stetson*, *supra* n.36, 345 A.2d 679 at 690 (1975):

> In general, one who seeks to surcharge a trustee bears the burden of proving that the trustee breached an applicable fiduciary duty. *Killey Trust*, 457 Pa. 474, 478, 326 A.2d 372, 375 (1974); *Linn Estate*, 435 Pa. 598, 607, 258 A.2d 645, 650 (1969). However, when a beneficiary has

succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred, we believe that the burden of persuasion ought to shift to the trustee to prove, as a matter of defense, that the loss would have occurred in the absence of a breach of duty. Accord, *Branch* v. *White*, 99 N.J.Super. 295, 313, 239 A.2d 665, 674, cert. denied, 51 N.J. 464, 242 A.2d 13 (1968;[15] cf. Restatement (Second) of

[15] "[T]he burden of proof should be on the defaulting trustee clearly to disestablish causal connection between default and loss to the beneficiary, rather than the contrary.

Trusts § 212(4) (1959). We believe that, as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty. This is an appropriate federal rule of fiduciary obligation as well. The district court, having found that the Union was in an illegal conflict of interest position in its domination of the trust, nevertheless placed the burden of proof on the pensioner beneficiaries, and ruled:

> ". . . I conclude that the plaintiffs have not met their burden of establishing that the trustees breached their § 302 and common law duties of individual loyalty by purposefully failing to collect delinquent operator royalties in order to benefit the union." Joint Appendix at 111a.

[26-28] Placing the burden on the pensioners instead of on the Union and trustees who were in a position of divided loyalty and domination due to their violation of § 302(c)(5) was legal error which requires a reversal.[35] But in addition, the court expressly found that

[35] *See also, In Re Estate of Maurice*, 433 Pa. 103, 108, 249 A.2d 334, 336 (1969); *Brown's Estate*, 287 Pa. 499, 501-02, 135 A. 112, 113 (1926); *Societa Operaia Di Mutuo Soccorso Villalba* v. *DiMaria*, 40 N.J.Super. 344, 349, 122 A.2d 897, 898-99 (1956).

> ". . . the trustees failed to pursue the delinquincies, even within the framework which they adopted, with sufficient diligence to achieve that degree of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property. Moreover, I find that under the circumstances it was unreasonable for the trustees to persist in their tolerant approach for as long as they did." Joint Appendix at 126a.

Appellees challenge this finding, but it is supported by detailed findings of fact amply supported by the evidence. This finding of trustee negligence applies to the period prior to 1964. Joint Appendix at 133a. The trustees who served during that period are deceased and their estates have not been joined as parties. One trustee defendant, Thomas, began his tenure in 1963, but the court found that he had not been personally guilty of negligence. The district court concluded:

> "[t]hus, although it is the finding of this Court that past trustees violated their fiduciary duty to the Fund's beneficiaries to make reasonable efforts to enforce the operators' obligations to the Fund, none of the trustee defendants in this lawsuit may be held liable for the violation by their predecessors." Joint Appendix at 134a.

We cannot quarrel with that conclusion.

[29] We do, however, differ with the conclusion that the breach of fiduciary duties which occurred during the time when the enormous losses occurred should not be attributable to the Union, which throughout that

period was in actual control of the collection efforts as a result of the § 302(c)(5) equal representation violation. That conclusion is set out as follows:

> "The argument that the Union *caused* the trustees to fail to collect royalty payments *in order* to protect working miners is a corollary to the contention that the trustees purposefully failed to collect royalties in order to benefit the Union. As has already been discussed, *supra*, the record in this case does not disclose that the trustees purposefully failed to collect royalties, nor does it support the conclusion that they failed to collect royalties in order to benefit the Union by protecting the interests of working miners. It establishes no more than the trustees were negligent in not pursuing their collection policies more diligently and in persisting in their tolerant approach to the problem for as long as they did. Thus, the short answer to plaintiffs' argument concerning the Union's participation in the trustees' purposeful breach of their fiduciary duties is that because the underlying theorem is not true, the corollary is also untrue, that is, the Union could not have caused the trustees to fail to collect royalties in order to protect working miners because the record does not establish that the trustees acted unlawfully in order to protect working miners." Joint Appendix at 136a-137a.

This reasoning suffers from the same defect we noted above with respect to the burden of proof. But more fundamentally, it is inconsistent with the court's finding that the trustees delegated to the Union the collection responsibility and that the Union willingly undertook it. Since the Union undertook the task and controlled the fiduciaries, it became a fiduciary, and its duty toward the fund beneficiaries should have been

measured by the same standard of care as the court applied to the trustees.

In rejecting this contention the district court distinguished *Blankenship* v. *Boyle*, 329 F.Supp. 1089 (D.D.C.1971) which held the Union liable when union trustees, dominating the Fund in violation of § 302(c)(5), allowed large sums of the bituminous coal industry fund to remain in interest-free accounts at a union-owned and controlled bank. The district court reasoned that while the relationship between the Union and the fund in that case and this were the same,

> "[t]he trustees in *Blankenship* were guilty of a breach of their duty of loyalty; the trustees here are not."

That distinction will not wash. A majority of the trustees in this case were union officers illegally controlling the fund, and it was that very illegality which permitted them to delegate to the Union, which had divided loyalties, the responsibility for dealing with the mine operators. This was a breach of their duty of loyalty. The Union participated in it. The measure of its responsibility for that participation is a fiduciary measure, and the burden of establishing that the losses would have occurred despite its participation was on the Union, not on the pensioners.

[30] The district court refused to attribute to the Union the negligence of the Union officer trustees, reasoning:

> "If the Union trustees acted as agents of the Union in their capacity as trustees, then they would have violated their duty of loyalty to the beneficiaries. As has already been held, *supra*, there is no breach of the duty of loyalty in this case." Joint Appendix at 144a-145a.

This reasoning disregards the facts, as well as the Congressional command of the equal representation

provision of § 302(c)(5). The Union was in control of the Fund, in a manner forbidden by the statute. The Union officer trustees did in fact turn over to the Union in the relevant period, responsibility for dealing with the mine operators. Such meager enforcement efforts as were made were those of the Union, not the Trustees. Those efforts did not meet the standards of care of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property. If they had, the court could not have found the trustees to be negligent. Since the Union put itself in the position of dominating the Fund in a manner forbidden by § 302 (c)(5) it cannot escape liability for its negligent handling of delinquent royalty payments.

The Union urges that in the event it is held liable it should be permitted to reduce its damages by the total amount it loaned the fund since 1951. Over the years, loans totaling $9,247,334 were made by the Union, at times when the precarious condition of the Fund might have forced suspension of pension payments. Of the $9,247,334 some $1,945,000, loaned since January 1974 remains due. In the years from 1951 to 1953 the Union loaned the Fund $4,403,334. These loans were unilaterally forgiven by action of the Union's International Executive Board on July 14, 1959, by the resolution quoted in the margin.[38] In the years 1960-1961

[38] "Resolved, that the International Executive Board in session this day, in consideration of a loan of long standing made from time to time by the International Union to the Anthracite Health and Welfare Fund, designed to make possible the continued payment of $50 per month pension now in effect, be forgiven, canceled as obligations, and the promissory notes bearing on same be nullified; that the Secretary-Treasurer of the International Union be authorized and instructed to advise the Anthracite Health and Welfare Fund of this action, and attend to all necessary details incident to the implementation

the Union loaned the Fund $2,885,000. On January 21, 1970, five years after the instant lawsuit was started, the Executive Board voted to its treasurer "the authority to write that $2,885,000 off as an asset of the Mine Workers Union and wipe it off our books, the same as we did before." Joint Appendix at 263a-264a.

The Union urges that either the rule prohibiting double recovery or the doctrine of equitable recoupment should result in a reduction of its liability by the amount forgiven. The district court, without distinguishing between the two separate transactions, concluded that the rule against double recovery was applicable.

The record contains no evidence as to the purpose of the forgiveness of indebtedness other than the quoted resolutions of the executive board. There is, however, evidence that the Fund's financial difficulties arose not only from the failure to collect delinquent royalties, but also, and in much larger degree, from the decline in anthracite production. There is no evidence in the record from which it could be found that the 1959 forgiveness of indebtedness was intended to be in reparation for the failure to collect royalties. There is at least a scintilla of evidence that the January 21, 1970 forgiveness of indebtedness was so intended, since the motion was made in the context of a discussion of delinquencies and pensioner dissatisfaction. The district court made no distinction between the two transactions, concluding that

> ". . . the forgiveness of the loans, rather than indicating an intent to make a gift, was more likely

of this declaration, all in the interests of the members of the United Mine Workers of America in Districts 1, 7 and 9, as represented by this International Executive Board." Joint Appendix at 233a.

> a recognition that the loans could never be repaid by the Fund."

It held, therefore, that if the Union were to be held liable, it should be permitted to set off the forgiven loan balance against the proven damages.

[31-34] We express no opinion on whether the intent behind the loan forgiveness should be dispositive on the question whether a set-off is allowable. The issue has not been raised before this court, and should be presented to the district court on remand. But clearly if the sums forgiven were gifts, no set-off should be allowed. Certainly a donor to an irrevocable trust could not set off his liability for participation in a breach of trust by the amount of his gift. Set-offs of trust funds are unavailable to trustees against their liability in another capacity.[39] The district court's conclusion that no gift was intended is highly speculative in the absence of any real evidence of the Executive Board's intention. If the pensioners had the burden of proof on that issue we could affirm that part of the decision. But although the court did not specifically address the burden of proof question in that part of its opinion, it would appear to have addressed the gift problem making the same assumptions as to burden which we earlier held to be error. When one in a fiduciary relationship asserts a set-off to a liability for participating in a breach of trust, the burden, it seems to us, should be on him to establish that the transaction on which he relies properly qualifies for that set-off. Since we do not believe the district court considered the

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[39] *See Annotation,* "Right of trustee to withhold trust payments from beneficiary to obtain payment of personal debt of latter to him, or to set off such debt against payment to beneficiary," 8 A.L.R.2d 209 (1949); 76 Am.Jur. 2d, Trusts § 599, p. 805 n. 38 (1975), and cases there cited.

set-off issue in that light, a remand for reconsideration is appropriate.

The judgment of the district court will be vacated and the case remanded for further proceedings in which the liability of the Union shall be redetermined by the application of the fiduciary standards of conduct and burden of proof set forth in this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 8796 Civil

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS

v

EMMETT THOMAS, JOSEPH FAUZIO, FRANK J. GALGAY and WILLIAM SAVITSKY, Trustees of the Anthracite Health and Welfare Fund

and

UNITED MINE WORKERS OF AMERICA, an Unincorporated Trade Union Association

MEMORANDUM AND ORDER

This is a derivative class action brought on behalf of pensioned anthracite miners and the widows of such miners who are beneficiaries of the Anthracite Health and Welfare Fund (the Fund), a pension and welfare trust fund created by the Anthracite Wage Agreement of June 7, 1946 (the Agreement) between the United Mine Workers of America (the Union) and the signatory anthracite operators, and funded solely by operator contributions on the basis of a fixed royalty per ton of coal produced. Defendants are the trustees of the Fund and the United Mine Workers of America. In essence, plaintiffs claim that there is presently outstanding a total in excess of $9,000,000 in delinquent

operator royalty payments, a total which has accumulated over the years since the inception of the Fund, and that the trustees are liable to the Fund for that amount, together with interest and costs, because they permitted the delinquencies to accumulate and made insufficient attempts to collect them once they accumulated. The complaint predicates liability on the trustees' actions during the period June 7, 1946 to January 23, 1969. In addition, plaintiffs maintain that the Union is equally liable with the trustees because the Union, in order to further the interests of working miners, to the detriment of the pensioned miners, caused the trustees to refrain from taking any action to collect the delinquencies. The alleged Union motive was that strike action or litigation against many of the operators would result in the collapse of these operators because they were marginally financed and the end result would be that active miners would be put out of work.

Federal jurisdiction is predicated under Section 301 of the Labor Management Relations Act of 1947, 28 U.S.C. § 185(a) (hereinafter Section 301), for breach of a collective bargaining agreement; Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186(e) (hereinafter Section 302), for violations of 29 U.S.C. § 186(c)(5), which specifies the structure of pension and welfare trust funds; 28 U.S.C. § 1337 for breach of the duty of fair representation; and the doctrine of pendent jurisdiction for violations of the common law of trusts. Defendants contest the jurisdiction of this Court, and, in addition, offer several defenses on the merits. After extensive discovery, the case was tried to the Court without a jury, and following the trial, detailed and voluminous briefs and proposed findings of fact were submitted and the case was fully argued. This opinion constitutes the Court's findings of fact and conclusions of law.

I. *Procedural History*

The procedural history of this case is long and complex, and much of it is relevant to the discussion which follows. It begins on March 11, 1963, when the plaintiffs filed a complaint against the Union in the Eastern District of Pennsylvania claiming that the Union had failed to carry out the terms of the Agreement in that it had failed to collect the delinquencies that were outstanding at that time. Jurisdiction was based on diversity of citizenship, and on December 11, 1963, the District Court granted the Union's motion to dismiss for lack of diversity. Nedd v. United Mine Workers of America, 225 F. Supp. 750 (E.D. Pa. 1963). On May 29, 1964, the Court of Appeals affirmed the decision of the District Court. 332 F. 2d 373 (3d Cir. 1964). Thereafter, the instant suit was filed in this Court on January 21, 1965, naming the Union as the sole defendant, and predicating jurisdiction on Section 301 for breach of a collective bargaining agreement. On September 30, 1966, this Court denied the Union's motion for summary judgment, an order which was subsequently vacated by the Court of Appeals on interlocutory appeal perfected under 28 U.S.C. § 1292(b). Nedd v. United Mine Workers of America, 400 F. 2d 103 (3rd Cir. 1968). The Court of Appeals held that, inasmuch as the Union had no duty under the Agreement to enforce the operators' responsibility to contribute to the Fund, the Union's failure to act was not a breach of a contract between an employer and a labor organization, and, hence, there was no jurisdiction under Section 301. The Court indicated, however, that the Union's conduct, as alleged in the complaint and proposed amplifying amendments which had been submitted during the appeal, may have amounted to a breach of its duty of fair representation, and remanded the case to permit the plaintiffs to amend their complaint.

In addition, the Court stated that, inasmuch as the Agreement made explicit the normal obligation of the trustees to use due diligence and all reasonable means to collect and prevent delinquent obligations to the Fund, on remand the trustees should be joined as necessary parties to the lawsuit.

On January 23, 1969, the amended complaint was filed, adding the trustees as defendants, and asserting the four grounds of jurisdiction described *supra* in the introduction to this opinion. Thence followed a long period of discovery and several discovery-related motions not relevant here. Finally, on June 19, 1974, the Court denied without opinion the defendants' motions to dismiss for lack of subject-matter jurisdiction, and, on July 15, 1974, a two-day nonjury trial commenced. The trial consisted primarily of submissions of documents, and only three witnesses testified, all for the defendants. Thereafter, the parties submitted voluminous detailed briefs and proposed findings of fact, and, on June 16, 1975, the case was fully argued before the Court. The record was finally closed on August 8, 1975 with the filing of a reply brief by the Union.

II. *Factual Background*

This portion of the opinion will outline the general factual background of the case. A more detailed narration of the facts relevant to each stage of the applicable law and the asserted grounds for relief will be made in the context of the discussion of each such stage.

A. *Organization and History of the Fund*

As mentioned *supra*, the Fund was created by the Agreement of June 7, 1946. Its primary purpose was to pay pensions to retired miners and death benefits to their widows. It was to be funded solely by operator contributions on a per tonnage basis, and the initial

Agreement provided that the rate of payment was to be 5¢ per ton of coal produced. This rate of royalty payments was thereafter increased to 10¢ on July 10, 1947; 30¢ on March 16, 1950; 50¢ on October 1, 1952; and 70¢ on February 1, 1959.

The initial Agreement also provided that the Fund was to be managed by three trustees, two appointed by the president of the Union and one appointed by the Operators. Following the passage of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, which provided that employees and employers be equally represented in the administration of pension and welfare trust funds, together with such neutral persons as may be agreed upon, one of the Union trustees was designated by the Anthracite Wage Agreement of 1948 as the "neutral" trustee. In 1966, the provisions of the Anthracite Wage Agreement with respect to the selection and designation of the trustees were again amended, this time to provide that of the three trustees, one would be appointed by the Union, one by the Operators, and the third would be a "neutral person selected by the other two trustees." *See* Agreement of September 1, 1966, p. 3. The Agreement of 1966 also provided, however, that the prior "neutral" trustee would remain as the "neutral" trustee under the new agreement. Thus, during the years 1948-1967, two of the three trustees of the Fund were Union appointees.

The trustees who have served from the inception of the Fund through the period covered by this suit, and the dates of their service, are as follows: The Union-appointed trustees were Thomas Kennedy, who served from 1946 until 1963; John O'Leary, who served from 1946 until 1947; and Emmett Thomas, who served from 1963 through 1969. The Operator-appointed trustees were Robert Birtley, who served from 1946

until 1953; Harry J. Connolly, who served from 1953 until 1964; and John D. Jillson, who served from 1964 through 1969. The "neutral" trustees were Mart F. Brennan, 1947-1967; and Nicholas J. Haydock, 1967-1969. On plaintiffs' motion, the present trustees of the Fund, William Savitsky, Joseph Fauzio and Frank J. Galgay were joined as parties to this suit on July 3, 1974, in order to receive on the Fund's behalf any judgment which might be recovered from the Union as a result of this lawsuit. On the same date, also on plaintiffs' motion, the suit was dismissed as to trustees Haydock and Jillson, thereby leaving Emmett Thomas as the only past trustee who is still a party.

With respect to the duties of the trustees, the initial Agreement provided: "Subject to the stated purposes of the Fund, the Trustees shall have full authority with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions of benefits and all related matters." An Interim Agreement of September 17, 1952 provided that the "Trustees of the Fund shall use due diligence and all reasonable means to collect and prevent delinquent obligations to the Fund." Other provisions with respect to the administration of the Fund were added by Anthracite Wage Agreements subsequent to the Agreement of 1946. The Agreement of 1948 provided that "Title to all monies paid into said Fund shall be vested in and remain exclusively in the Trustees of the Fund . . ." and that an annual audit of the Fund be performed by competent auditors. A 1964 amendment expressly provided that title to monies *owed* the Fund would also be vested in the trustees. Furthermore, relative to the operators' obligation to report tonnage production on which the royalty was to be assessed, while each operator was required under the original Agreement to

submit a statement to the Fund reporting its monthly coal production, the Agreement was amended in 1959 to require that the monthly reports be submitted under oath, and to grant the trustees the right to station checkers on the operators' premises and to audit the operators' books to verify tonnage figures.

The history of the Fund has been characterized primarily by financial precariousness, which, from the inevitably better vantage of hindsight, is not surprising in light of the fact that revenues for the unendowed Fund have always been pegged to production in an industry which declined rapidly following the creation of the Fund in 1946. The most notable statistic concerning the financial status of the Fund, from the standpoint of its beneficiaries, has been the steady decline in benefit payments. The amount initially paid by the Fund to each pensioner was $100 per month, and the death benefit payable to widows and orphans was $1,000. In 1954, these amounts were reduced to $50 and $500 respectively, and, in 1958, the pension was further reduced to $30 per month. After the pension had been temporarily increased to $50 per month, it was again reduced to $30 in 1961. No death benefits were paid during the years 1959-61, and none have been paid since 1964. It was following the 1961 reduction that the Panther Valley Protest Committee, a group of pensioned anthracite miners, was formed, and Charles Nedd, one of the plaintiffs in this case, was selected as Chairman of that committee.

Paralleling the reduction in benefit payments from the Fund was the drastic decline of the Anthracite Industry as a whole, caused primarily by the steadily decreasing demand for coal for domestic uses, as natural gas and heating oil replaced coal for those uses in the years following World War II. The years 1946 through 1968 brought dramatic drops in the tonnage

of coal produced, the amount of revenue earned, and the number of persons employed by the coal industry. For example, the figures for 1947 show approximately 58,000,000 tons of coal produced, $413,000,000 in gross revenues, and 80,000 persons employed. The corresponding approximate figures for 1955 were 26,000,000, $206,000,000, and 37,000, while those for 1965 were 14,000,000, $97,000,000, and 12,000. Compounding the problems visited upon the Fund by the decline of the anthracite industry during these years was the increase in the number of pensioners during the same years. In 1949, for example, there were approximately 7,000 pensioners; by 1969, the number of retired miners entitled to pensions had increased to 13,000.

Theoretically, of course, the negotiated increases in the rate of royalty payments by the operators, *see supra*, should have helped to alleviate some of the Fund's financial problems caused by the decline of the industry.[1] The fact is, however, that substantial delinquencies in operator payments to the Fund occurred and accumulated over the years. For example, as of December 1, 1954, the first year for which such figures are available, 46 companies were delinquent in a total amount of almost $2,500,000; and by 1962, 120 companies were delinquent in an amount close to $12,000,000. See the chart at Appendix A to this opinion.[2] It is

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[1] It seems clear, however, that even if all of the operators had remained current in their royalty payments, the Fund still would have incurred severe financial problems. This is evidenced by the fact that, periodically over the years since 1951, the Fund has obtained from the Union sufficient amounts to permit it to make benefit payments. *See infra*. The total amount received from the Union, none of which has been repaid by the Fund, is in excess of $9,000,000, a sum which approximates the total amount of delinquencies which are the subject of this suit.

[2] These figures include companies which had ceased to operate as of the time the figures were tabulated. For example,

the bulk of these delinquencies that forms the basis of this law suit.

B. *The Actions of the Trustees*

The actions of the trustees with respect to the delinquencies can be divided into three periods, each one representing a substantially different approach to the problem: the years prior to 1954; 1954-1962; and the period after 1962.

The record reflects little activity on the part of the trustees during the years prior to 1954.[3] It does indi-

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as of January 1, 1962, there were 79 nonoperating companies that were delinquent by approximately $6,400,000. The steady annual increase in nonoperating companies, incidentally, is yet another indication of the precipitous decline of the industry during the 1950s. Decreased demand for Anthracite, increased costs and intense competition among the operators, combined to force large numbers of companies out of business each year. It should also be pointed out that, while plaintiffs claim most of the total delinquencies as damages, together with interest, they confine their claim to 89 of the more than 100 companies with outstanding delinquencies as of January, 1969. Plaintiffs maintain that the trustees' conduct has been deficient with respect to these 89 companies.

[3] A basic problem concerning this period, as well as the period 1954-1962, is that none of the trustees who served during those years are living. John O'Leary died in 1947; Robert Birtley in 1953; Thomas Kennedy in 1963; Harry Connolly in 1964; and Mart Brennan in 1968. Thus, written records, principally minutes of the trustees' meetings, must be resorted to in an effort to determine what was done during those years. In addition, there is no one to explain the reasons for the trustees' actions, or lack of particular actions, during those years. Nevertheless, while such a limitation may deprive the factfinder of knowledge of some incidental actions taken by the trustees during those early years with respect to the delinquencies, it is undisputed that no formal action, either in the form of lawsuits or written agreements with the delinquent operators, was taken during the time prior to 1954. A more basic problem with respect to this period is that there are no records of how many delinquencies there

cate that the trustees were concerned with the problem of delinquent operators at least as early as February, 1949; the minutes of the trustees' meeting for that month, and for almost every month thereafter, indicate that the problem was discussed during the meeting. In addition, on several occasions the trustees sent letters to delinquent operators urging them to become current in their payments. On one occasion, the trustees resolved to take legal action against two delinquent operators; apparently, however, no such action was ever taken.[4] The trustees also established an enforcement program that made use of the Union on local levels to attempt to collect outstanding delinquencies.[5] For a more detailed description of this program, see the discussion of the Union's actions, *infra*.

There was an increase in trustee activity during the years 1954-1962. Nevertheless, during this time, the number of delinquent companies increased from 46 to 120, and the total amount of overdue payments rose

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were in the years prior to 1954, and thus it is difficult to evaluate the sufficiency of the actions taken by the trustees during those years. Still, the record does show that by the end of 1954, 46 operators were delinquent in a total amount of almost $2,500,000, and thus it is safe to assume that there were substantial delinquencies in the years prior to 1954, even if the precise amount of those delinquencies cannot be calculated.

[4] See minutes of the meeting of July 19, 1949, which report that the trustees resolved to have the Fund's attorney at the time, Martin B. Gormley, "take whatever legal action necessary . . . against Jermyn-Green Company and also the Haddock Mining Company, both companies which are delinquent in their payment to the Fund." The record does not indicate whether any legal action ever was taken against those companies, and, presumably, no such action ever was taken.

[5] This is merely an early example of the close relationship between the Union and the trustees in managing the affairs of the Fund. The relationship of the Union to the Fund is discussed in greater detail *infra*.

from approximately $2,500,000 to almost $12,000,000. The problem of delinquencies continued to be discussed at almost every meeting of the trustees, as the minutes reflect discussions concerning the efforts to collect the overdue amounts. Beginning in 1954, the trustees entered into a series of written agreements with several of the non-paying operators in an attempt to insure payments on current production from these companies and to collect as much of the past due amounts as possible. Ten such agreements were made during this period, and they typically provided that the operator agreed to pay on current production, to make a down payment on his overdue amount, and to make installment payments on the delinquent balance. Eight of the agreements represented a settlement of a lawsuit in state court brought against the operator by the trustees for the overdue payments, and the rest followed negotiations between the trustees and the operator. While occasionally these agreements resulted in the collection of the delinquencies owed by an operator,[6] far more often the result was a failure of the operator to abide by the agreement with respect to the payment of past due amounts, and a continuing failure to make full payments on current production, with a resulting increase in the total amount overdue. The record with respect to the St. Clair Coal Company is illustrative. On November 22, 1954, an action was commenced by the trustees in Schuylkill County against St. Clair for $880,864.62 in delinquencies for the period July 1,

[6] For example, at the trustees' meeting of August 10, 1956, an agreement with Valley View Coal Company was approved, and by May 24, 1957, that company's debt of over $14,000 had been paid in full. It should be noted, however, that the agreement did not fully solve the Fund's problems with the Valley View Company. When Valley View went out of business in June of 1958, it had accumulated a new delinquency of over $19,000.

1948 through September 30, 1954. On September 22, 1955, this suit was settled by written agreement between the trustees and St. Clair whereby St. Clair promised to pay $5,000 per month on its arrearages in addition to making payments on its current production. At the trustees' meeting of April 5, 1957, however, it was noted that the company had not kept its agreement to make payments on the delinquency, but that it had agreed to pay $10,000 a month on arrearages in the future. A little over a month later, the company reported to the trustees that they were unable to pay the $10,000 per month, but that they would pay $5,000 per month on their delinquency as originally agreed. Finally, St. Clair ceased operations in October, 1957, still owing an amount which plaintiffs claim to be in excess of $1,000,000.

The trustees also filed lawsuits in state court against some of the delinquent operators during the period 1954-1962. On the whole, these suits were not pursued vigorously and were largely ineffectual in collecting overdue amounts. Most of these actions were never pursued beyond the complaint stage and only a small fractional amount was ever recovered. The record shows that from 1954 through 1962, the trustees instituted 30 lawsuits against 26 delinquent operators and obtained judgment in eight, on which a total of $79,455.07 was collected. Eight of the lawsuits were settled by the written agreements described *supra*. The record is unclear as to the disposition of the remaining suits.

Besides the written agreements and the lawsuits, the other significant action taken by the trustees during the period 1954-1962 was in connection with verifying the tonnage of coal reported by the operators on which royalty payments were supposed to be made. In 1959

they retained the accounting firm of Lybrand, Ross Brothers and Montgomery to audit the records of contributing companies to determine whether the companies were reporting accurately. It will be recalled that, under the 1959 Agreement, the Fund first acquired a contractual right to audit the companies' tonnages. Prior to that time, the trustees had used as a source of information in determining tonnages a monthly statement prepared and submitted by each company to the Fund, reporting its production for that month. Beginning in 1960, the trustees learned as a result of the Lybrand audits that some of the companies were not reporting proper tonnage, that is, that they were underreporting the tonnage of coal produced for use or for sale, and in this manner were accumulating delinquencies at the same time that it appeared that they were making proper payments. No action, however, was taken concerning this false reporting prior to 1964 when the trustees began a series of federal suits against several of the operators. *See infra.* In addition, Lybrand reported to the trustees that several companies refused to give them access to their books in order to conduct an audit. The minutes of the trustees meeting of January 25, 1960 also report that the cases of some such companies were placed in the hands of counsel for immediate action. The record reveals no further action with respect to those companies, however. Besides the Lybrand audits, the other action taken by the trustees regarding verification of the operators' reports was to station checkers on the operators' premises, as initially authorized by the contract of 1959. Two checkers were employed by the Fund in the years 1959-1963, and thereafter the number of checkers varied, viz, 3 in 1964, 9 in 1965, 3 in 1966, 23 in 1967, 65 in 1968, and 45 in 1969.

The period after 1962 brought additional changes in

the trustees' approach to the problem of delinquencies.[7] In January, 1962, Charles A. Shea, Esquire, was retained as Special Counsel to the Fund. After reviewing the Fund files, Mr. Shea became concerned (a) that the Welfare provisions of the Agreement did not comply with Section 302(c)(5) of the Labor Management Relations Act of 1947 (noting that illegality of the Fund had been asserted as a defense in prior litigation brought by the Fund against the operators),[8] and (b) that the trustees might not have the right to institute suit to collect delinquencies inasmuch as the agreement vested title in the trustees of monies actually paid into the Fund did not vest in them title to claims for monies owing to the Fund. Mr. Shea, consequently, recommended to the trustees that, prior to the institution of legal actions against delinquent operators, an effort be made to secure amendment to the Agreement so that its language would conform to the Act and the possible disability of the trustees to sue would be removed. However, the record indicates no action with respect to either of these recommendations until April, 1964, when the Agreement was amended to vest title in the trustees to monies owed the Fund, and the trustees adopted a resolution incorporating new rules and regu-

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[7] A substantial contributing factor in the increase in trustee activity during this time was the formation of the Panther Valley Protest Committee in June, 1961, and the retention of counsel by the Committee in August, 1962. For a description of the activities of the Committee and its counsel, and an analysis of their effect on the actions taken by the trustees during the years following 1962, *see* Thomas v. Honeybrook Mines, Civil No. 8499 (M.D.Pa., filed April 13, 1973), pp. 11-17.

[8] Specifically, Shea noted that there was no provision that the funds were to be set aside in an irrevocable trust to be used solely for the payment of benefits; that there was no provision for breaking a tie; and that trustee Brennan, though jointly appointed by the Union and the Operators, might not satisfy the neutrality requirement inasmuch as he was a Union official.

lations regarding the operation of the Fund in an effort to bring it into conformity with Section 302. Brennan, however, refused to resign as trustee until February, 1967. The agreement itself was not amended to insure conformity with Section 302 until 1966. On May 18, 1964, shortly after the actions in April, 1964 to remove the disability to sue and conform the operation of the Fund to Section 302, the first of several federal suits against the operators was instituted. *See infra.*

The record reveals little direct activity by the trustees with respect to delinquencies during the years 1962 and 1963. This was probably because most of the activity on behalf of the Fund during those years was conducted by the Union. In the summer and early autumn of 1962, various delinquent operators were struck by the Union and, as a consequence, letter agreements for the payment of delinquencies were executed between, on the one hand, 17 of the forty-three delinquent companies then operating, and, on the other, four Union officials: W. A. Boyle, at the time the Vice President of the International Union; August J. Lippi, the President of District #1 of the Union; Mart F. Brennan, the President of District #7;[9] and Joseph Kershetsky, the President of District #9. Although it was primarily at the Union's initiative that the letter agreements were executed, the threat of Union strikes being the main cause of the delinquent operators coming to the conference table in the first place, and non-trustee Union officials played the major role on behalf of the Fund during the negotiations, *see infra*, nevertheless, the trustees also played a part in securing the

[9] Although Brennan was also a trustee of the Fund at this time, and participated in the negotiating of the letter agreements in his capacity as a trustee as well as in his capacity as a Union official, he signed the agreements as President of District #7 and not as trustee of the Fund.

agreements. Trustee Brennan participated in all of the negotiations leading to the agreements, and Attorney Shea drew up all of the agreements in his capacity as Special Counsel for the Fund.

These 1962-63 agreements were similar to the earlier agreements between the trustees and delinquent operators that had been reached during the fifties, in that they provided for a down payment on the total amount past due and an installment payment plan on the balance. In contrast to the earlier agreements, however, the later ones were successful in bringing substantial payments of overdue amounts into the Fund. The letter agreements negotiated between August, 1962 and March, 1963, arranged for the payment of $4,648,-880.42 in delinquencies. At least three of the operators who signed letter agreements had paid their delinquencies in full by the end of 1964. In addition, a number of other signatory companies had significantly reduced their outstanding delinquencies by that time. At the same time, however, some of the agreements were not even minimally successful; at least four signatory companies not only failed to make the agreed-upon payments on their delinquencies, but also failed to pay on current production, thereby increasing their overall delinquency. In addition, in spite of the early adherence to the agreements by most of the signatory companies, the majority of them eventually fell behind again in their payments; ten such companies were sued in federal court by the trustees in the mid-sixties. Thus, while the 1962-63 agreements were an improvement on the agreements of the fifties, like the earlier agreements, they did not represent a final solution of the Fund's financial problems.

On May 18, 1964, suit was filed in this Court by the trustees against Honeybrook Mines, Inc. seeking its total overdue payments that were outstanding at that

time. Jurisdiction was predicated under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), for breach of a collective bargaining agreement. This was the first of 37 federal suits that were brought by the trustees in the years 1964-1968 against delinquent operating companies. Only Honeybrook was sued initially because, on the advice of counsel, the trustees wanted to bring a test case in order to determine whether jurisdiction for such a suit would be sustained under Section 301. In addition, the decision was made to sue Honeybrook because that company had been particularly flagrant in permitting delinquencies to accumulate and in refusing to permit its records to be examined to determine precisely how much it owed. In December, 1964, before a decision on the jurisdictional issue was made, the trustees also sued Northwest Mining Company in federal court because that company became similarly flagrant in not paying royalties and in refusing to permit investigation of its records.[10]

Following the decision of this Court in March, 1965, sustaining jurisdiction under Section 301, the trustees commenced a large number of federal actions against delinquent operators. Eleven were begun in 1965, 18 in 1966, four in 1967, and two in 1968. The trustees were advised by counsel to confine the suits to operating companies in order to limit legal expenses to lawsuits against companies from which there was a reasonable prospect of collecting any money once

[10] A significant factor in the decision to file the federal suits of the 1960s was the desire to utilize discovery in order to ascertain the exact amount of delinquencies. In light of this factor, the decision to sue Honeybrook Mines, Inc. and Northwest Coal Co. first, rather than suing all the delinquent companies simultaneously, is understandable. Both companies were particularly defiant in refusing access to their records.

judgments were entered. Thus, with the exception of suits against two large publicly owned companies, viz, Hanna Company and Hudson Coal Company, the suits were limited to operating companies. These federal actions contrast sharply with the state suits brought by the trustees in the fifties. To begin with, the total amount of damages claimed in the suits was close to the total amount of delinquencies owed by all operating companies at the time the suits were brought. In addition, the suits were vigorously pursued once they had been commenced. Most of them reached the judgment stage, and several resulted in executions which brought money into the Fund. In all the actions commenced since 1964, the trustees recovered cash, as of July, 1970, in the amount of $1,535,160.22 and settlements and judgments totaling $7,335,257.18.

C. *The Actions of the Union*

As mentioned, *supra*, the Union has been intimately involved with the affairs of the Fund since its inception in 1946. It was due to the bargaining efforts of the Union that the Fund was created in the first instance. And, because of the Union's efforts, the royalty rate was increased regularly, from $.05 per ton in 1946 to $.70 per ton by 1959. On one occasion, in 1952, the Union conditioned the continuation without a work stoppage of the then-existing Anthracite Wage Agreement on the agreement of the Operators to increase their payments to the Fund from $.30 to $.50 per ton. On another occasion, in 1959, the Union negotiated a wage package which gave working miners one dollar a day less than they otherwise would have obtained in order to negotiate an increase in the amount per ton to be paid to the Fund by the Operators. In addition, Operator delinquencies in payments to the Fund have been a constant subject of collective bargaining be-

tween the Union and the Operators. In retrospect, the Union's close involvement with the Fund is not at all surprising, inasmuch as the Union supplied both the initiative which created the Fund, as well as the negotiating muscle in bargaining with the Operators concerning the terms and conditions of their contributions to the Fund.

Furthermore, a close relationship between the Union and the Fund was perhaps inevitable because of the manner in which the Fund has been organized. At most times relevant to this suit, two of the Fund's three trustees were Union officers.[11] As described, *supra*, this was initially in accordance with the express terms of the agreement itself, and later as a result of a designation of another Union officer as a "neutral" trustee by the Union and Operator trustees. While the record in this case does not contain a complete catalogue of all of the actions taken by the trustees during the lifetime of the Fund, there is no instance reflected in the record of this case of the two Union trustees casting disparate votes during their management of the Fund, and the record refers to at least one occasion on which the two

[11] At the time of his appointment as a trustee, Thomas Kennedy was Secretary-Treasurer of the Union. He continued to serve as a trustee of the Fund until his death in 1963, at which time he was President of the Union. John O'Leary was Vice President of the Union at the time he was made a trustee, and Mart F. Brennan was President of District 7, UMW at the time of his appointment. In addition, Brennan later became a member of the International Executive Board of the Union, and served in that capacity during almost 10 of the years he was a trustee. During his years as a trustee, Emmett Thomas was Special Representative for Anthracite Affairs for the International Union, UMW, and from 1948 through 1962, he was Executive Assistant to the President of the Union. He also was a member of the International Executive Board of the Union during some of the years that he was a trustee. Nicholas Haydock was not a Union official and had no prior association with the industry.

Union trustees expressed concern about whether actions on behalf of the Fund could be taken by two of the three trustees in order to avoid having the Fund, in effect, ruled by the Operator trustee.[12]

The most significant Union involvement in the affairs of the Fund, aside from the participation of Union officials as trustees, has been its attempts to enforce the Operators' duty to make royalty payments and its efforts to collect delinquencies. This involvement began at least as early as 1951, when the trustees resolved to set up an enforcement program that made use of the Union on local levels to attempt to collect outstanding delinquencies. This program provided that each district president would be a contract enforcement officer for his district, responsible for attempting to secure delinquency payments from companies in that district. Among other duties in this regard, the district presidents were to investigate the reason for delinquencies, evaluate the prospects for collection, and report the results of these efforts, as well as any further action planned for their districts, to the Executive Secretary of the Union. In addition, they were instructed to make all efforts to enforce collection, short of instituting legal proceedings, the responsibility for which expressly remained with the trustees. The only evidence of the success of this program reflected in

[12] That occasion was in 1946 when Mr. Kennedy asked the Fund's attorney, Martin Gormley, whether the Fund could be operated on the signature of two of the three trustees. The question arose when, in the process of opening the Fund's bank account, Mr. Kennedy was told by one of the bankers that all three of the trustees would have to sign the Fund's checks. With that, Mr. Kennedy "saw that the Fund would be ruled by Mr. Birtley," who was the trustee appointed by the Operators. Mr. Gormley informed him that, since the Fund was a charitable trust, action in its behalf could be taken by a majority of the trustees. See Vol. B of plaintiff's exhibits, p. 50.

the record of this case are letters written by the three district presidents in the latter part of 1953 to Thomas Kennedy, who at the time was both an officer of the Union and a trustee of the Fund, detailing the collection efforts that were being made in their districts at that time. Besides the enforcement program, the record contains numerous letters written by the President and other officers of the Union to delinquent operators, urging them to take care of their delinquencies and warning them that, if they did not, more formal action would have to be taken. In view of the numerous instances of Union attempts to collect delinquencies reflected in the record, as well as the scant evidence of direct communication between the trustees and the operators concerning delinquencies, it is fair to conclude that the trustees looked to the Union to furnish most of the effort with respect to enforcement of the operators' agreements to contribute to the Fund and collection of delinquencies, and that the Union unhesitatingly accepted this responsibility.

By far the most significant and successful actions of the Union with respect to collection of delinquencies were the letter agreements entered into by various delinquent operators and certain Union officials in 1962 and 1963. See *supra* for a more detailed description of these agreements and their results. The agreements themselves were precipitated by substantial Union activity on behalf of the Fund in the form of extended negotiations with delinquent operators, and strikes against such operators during 1962. The negotiations occurred in the months of August, September, and October, 1962, subsequent to strikes against some delinquent operators and attempted strikes against others, and consisted of 23 meetings with 17 operators. The meetings were attended by former UMW President John L. Lewis, the then current President, W. A.

Boyle, and various district officials on behalf of the Union, and Mart F. Brennan and Charles A. Shea, Esquire, on behalf of the Fund. They were held in Wilkes-Barre, Pennsylvania, and at International Headquarters, UMW, in Washington, D.C. At these meetings, the Union officials, particularly Mr. Boyle and Mr. Lewis, warned the operators of the potential legal consequences of their continuing breach of the collective bargaining agreement and of the possibility of shutdowns, and insisted that the operators begin making immediate and full payment of delinquencies owed to the Fund. As a direct result of these meetings, letter agreements were reached with 14 of the 17 operators.

The strikes which preceded the 1962 negotiations resulted in the shutdown of five operators during that year, and it was primarily as a result of those strikes and the threat of others that the delinquent operators came to the bargaining table during the latter half of 1962. The Union conducted several other strikes against delinquent operators during the history of the Fund; specifically, on 31 occasions during the years 1953-1962, the Union shut down operators for nonpayment to the Fund. Most of these strikes, however, were ineffectual in securing any satisfaction from the operators. This was primarily because most of the shutdowns lasted only one or two days, the Union being unable to convince the miners to stay out of work any longer than that on behalf of the Fund. Indeed, on several occasions, the Union tried unsuccessfully to strike delinquent operators; the miners were simply more concerned with maintaining their present income than with securing payments to the Fund which would be distributed to other, retired miners.[13]

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[13] The record with respect to District 9 is illustrative. That district had more companies with large delinquencies than the other two districts, and the Union made several efforts in the

The other significant Union involvement with the Fund has been in the form of loans to the Fund for the purpose of enabling the Fund to pay pensions. These loans were made by each of the three districts as well as by the International Union, and total $9,247,334.00 since 1952. Of this total amount, all but $1,954,000.00 has been forgiven by the Union, the balance representing loans by the International Union to the Fund since January, 1974.

Besides the above-described instances of significant Union involvement with the Fund, there have been numerous occasions of less significant Union participation in the Fund's affairs. One of these was the transfer of $205,000.00 of the Fund's monies to the National Bank of Washington, D.C., a Union-controlled bank, in December of 1962. This transfer was effected by Mr. Brennan alone, and was later, in March of 1963, ratified by the trustees. On two occasions prior to that ratification, when only Mr. Brennan and Mr. Connolly, the operator trustee, were present at trustee meetings, the resolution to transfer funds to the National Bank (thereby ratifying what had already been done by Mr. Brennan), failed to pass. All three trustees were present when the transfer was ratified in March of 1963.[14] No definite motive for this transfer

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early fifties to shut down delinquent District 9 operators. For the most part they were unsuccessful, failing to convince the men to stop work on at least five occasions, and only obtaining shutdowns of short duration in the few instances when the men agreed to stop work. Moreover, when the Union attempted to close down Hammond Coal Company, the Union representatives were "pretty nearly stoned off the property" by the working miners. Defendant's Exhibit 3, Deposition of John Egan, pp. 33-34.

[14] The record is ambiguous as to whether the resolution to transfer the funds to the Washington bank was carried unanimously. On the one hand, the minutes of the March 6, 1963 meeting of the trustees indicate that, on "motion by Brennan,

can be gleaned from the record in this case. On the one hand, plaintiffs maintain that the funds were transferred at the instance of the Union President, Mr. Boyle, solely to benefit the Union. However, the record fails to reflect that the National Bank paid anything other than the going rate of interest on the deposited funds, and, thus, it is impossible to conclude that the Fund was harmed by the transfer in question, and it is difficult to conclude that the Union benefited in any significant way from the transfer of such a relatively small amount of funds to a normal interest-bearing account in its bank. On the other hand, the Union insists that the reason for the transfer was that the National Bank was paying a higher rate of interest on such an account than could otherwise be obtained at that time. However, the basis for this requested finding is the deposition of John Jillson, who did not become a trustee until the latter part of 1964, more than one and one-half years after the transfer in question took place, and, therefore, he was actually in no position to know why the funds were transferred.

Another instance of Union involvement in the Fund's affairs was the transfer, in May, 1963, of the Fund's offices from the Markle Banking and Trust Company Building in Hazleton, Pennsylvania, to the United Mine Workers Building in the same city. While the new lease provided for a substantial increase in rent over what the Fund had previously been paying for its space in the Markle building, the new offices were much more spacious. The record contains no evi-

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seconded by Thomas, it was agreed to accept the Resolution . . ." that the funds be transferred. Vol. B of Plaintiffs' Exhibits, p. 309. The minutes do not indicate how trustee Connolly voted on the matter. On the other hand, the same minutes reflect that a later motion to pay all the Fund's checks through the account in the Washington bank "was carried by a vote of 2 to 1, with Trustee Connolly voting no." *Id.*

dence that the Union attempted to force the Fund to lease space in its building, and there is no evidence that the transfer of offices in any way harmed the Fund. The most that can be concluded from the move is that it was emblematic of the Union's intimate involvement with the affairs of the Fund and of the Fund's identification with the union.

A few additional facts concerning the Union's close relationship with the Fund should be mentioned. On seven occasions, the trustees held their regularly scheduled Fund meetings in the UMW offices in Washington, D.C. rather than at the Fund headquarters. To be eligible to receive a pension from the Fund, a retired miner had to remain a member in good standing of the Union during the period he received a pension, which included paying dues of $1 per month to the Union. In addition, all employees of the Fund belonged to District 50 of the UMWA until District 50 split from the UMWA, at which time the Fund employees became members of UMWA Local 13998.

III. *Jurisdiction*

Jurisdiction over the claim against the trustees is asserted under the following provisions: (1) Section 302 of the Labor Management Relations Act of 1947, for violations of the federal statute which specifies the manner in which pension and welfare trust funds are to be structured; (2) Section 301 of the Labor Management Relations Act of 1947, for breach of a collective bargaining agreement; and (3) the doctrine of pendent jurisdiction for violations of the common law of trusts. Jurisdiction over the claim against the Union is sought under the above three provisions, and is also asserted under 28 U.S.C. § 1337 for breach of the duty of fair representation. Inasmuch as defendants contest all the bases on which plaintiffs seek to

predicate jurisdiction, a discussion of the applicable law is necessary.

A. *The Claim Against the Trustees*

1. *Section 302*

Plaintiffs initially assert jurisdiction under Section 302(e), which gives the district courts jurisdiction "to restrain violations" of Section 302. Section 302 in turn prohibits payments by employers to employee representatives, labor organizations, employees or groups of employees (Section 302(a)), and, correspondingly, the request or receipt of such payments by any person (Section 302(b)). Section 302(c) enumerates certain exceptions to the blanket prohibition of Sections 302 (a) and (b). One of the exceptions permits payments to jointly administered employee pension and welfare trust funds (Section 302(c)(5)).[15] Defendants contend that plaintiffs' claim is not the type of case for which

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[15] "(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may

the jurisdictional grant of Section 302(e) was intended.

At the outset, a literal reading of Section 302(e) would seem to preclude jurisdiction of this case, inasmuch as plaintiffs do not claim that any payments have been made or received in violation of Sections 302(a) and (b). Indeed, the gist of plaintiffs' claim is for payments that employers did **not** make. Nevertheless, no court has restricted Section 302(e) solely to injunctions against payments allegedly being made or received in violation of Sections 302(a) or (b), *see, e.g.* Giordani v. Hoffman, 295 F. Supp. 463, 470 (E.D. Pa. 1969), and defendants do not argue here that the statute should be so limited. At the same time, while the courts have not confined Section 302(e) to its literal wording, neither have they, in spite of *dicta* in an early case, Copra v. Suro, 236 F. 2d 107, 115 (1st Cir. 1956), permitted the statute to furnish federal jurisdiction to inquire into mere "violations of fiduciary obligations or standards of prudence in the adminis-

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agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . ." 29 U.S.C. § 186(c)(5).)

tration of the trust fund . . .," Bowers v. Ulpiano Casal, Inc., 393 F. 2d 421, 424 (1st Cir. 1968). The reasoning behind this restriction has been that pension and welfare trust funds are established under the laws of the respective states, and Congress did not intend Section 302(e) to usurp the normal state function of determining the legality with which trust funds are administered. *See* Snider v. All State Administrators, Inc., 481 F. 2d 387, 390 (5th Cir. 1973). *See also* Moyer v. Kirkpatrick, 265 F. Supp. 348, 351 (E.D. Pa. 1967), *aff'd per curiam*, 387 F. 2d 955 (3d Cir. 1968); *and* Porter v. Teamsters Health, Welfare and Life Insurance Funds of Philadelphia and Vicinity, 321 F. Supp. 101, 103 (E.D. Pa 1970).

The type of suit that has been permitted to be maintained under Section 302(e) is a claim that a particular trust fund has not been established in accordance with the provisions of Section 302(c)(5), i.e., that it contains so-called "structural violations." *See, e.g.*, Giordani v. Hoffman, 295 F. Supp. 463, 470 (E.D. Pa. 1969). The theory underlying the allowance of such suits is that if a trust fund has not been established in accordance with the specifications of Section 302(c)(5), any employer payments to that fund violate Sections 302(a) and (b). *Id.*[16] A suit to enjoin a structural violation is, in effect, a suit to restrain violations

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[16] "Such structural violations would consist of contributions to a trust fund which was not established for the sole and exclusive benefit of employees and dependents; which did not hold payments in trust to pay, from principal or income, for such employees' medical care, pensions, illness, etc.; which did not set forth in writing the detailed basis of payments; which did not have equal representation of employees and employers with provision for a neutral person or umpire; which did not contain provisions for an annual audit; or which did not have a separate trust for pension and annuity funds." Bowers v. Ulpiano Casal, Inc., 393 F. 2d 421, 424, fn. 4 (1st Cir. 1968).

of Section 302, and therefore falls within the jurisdictional grant of Section 302(e).

Plaintiffs maintain that they have successfully alleged two structural violations in this case: (1) that the employees and employers were not "equally represented in the administration" of the Fund, in that, during the years 1948 through 1967, two of the three trustees were Union officers; and (2) that the Fund was not established for "the sole and exclusive benefit of the employees" in that the trustees were motivated by the Union's interests in their administration of the Fund, and not by the interests of the Fund's beneficiaries. *Compare* Giordani v. Hoffman, *supra*, at 471. Defendants do not dispute that allegations stating that employees and employers are not, at the time the allegations are made, equally represented in the administration of a fund, or that a fund was not established for the sole and exclusive benefit of the employees, would establish jurisdiction under Section 302(e); instead they maintain that plaintiffs have not made such allegations in this case.

With respect to the claim that employees and employers were not equally represented in the administration of the Fund during the years 1948-1967, in that, during those years, two of the three trustees of the Fund were Union members and officers, it seems clear that the composition of the trustees during those years violated Section 302's equal representation requirement. This is so in spite of the facts that, during the years 1948-1966, one of the Union trustees was designated by each annual Anthracite Wage Agreement as the "neutral" trustee, and, during the years 1966-1967, one of the Union trustees was the "neutral person selected by the other two trustees" in accordance with the terms of the Agreement. The fact remains that, in spite of these superficial efforts to com-

ply with the equal representation requirement, two of the three trustees were Union members and officers, thereby subjecting the Fund to possible Union domination and control, which Congress particularly intended Section 302 to prevent. See Arroyo v. United States, 359 U.S. 419, 425-426 (1959). ("Those members of Congress who supported the amendment were concerned with . . . the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.")[17] *See also* Quad City

[17] It should be noted at this point that, although the unequal representation of which plaintiffs complain here was a concern of Congress when it passed Section 302, the alleged abuse which plaintiffs maintain occurred as a result of Union domination of the Fund in this case contrasts sharply with the kinds of abuses that Congress had in mind when it passed Section 302. The essence of plaintiffs' complaint here is that the Union caused the Fund to avoid taking actions which were necessary to enforce the operators' obligation to contribute to the Fund and to collect delinquencies, particularly the filing of lawsuits against the operators, whenever such actions might have forced the operators out of business and thereby have jeopardized the jobs of working miners. While such action by the Union and the trustees, if proven, may amount to violations of the plaintiffs' rights under the common law of trusts, *see infra*, it is not the kind of abuse at which Section 302 was directed. When it passed Section 302, Congress was concerned with the wrongful uses to which a fund might be put once employer contributions to a fund have been made, not with the failure to enforce those contributions in the first place. As the Supreme Court has stated in a discussion of the legislative history of Section 302: "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for the purposes which Congress considered proper and expended only for the purposes for which they were established." Arroyo v. United States, *supra*, at 426.

Builders Association v. Tri-City Bricklayers Union No. 7, 431 F. 2d 999 (8th Cir. 1970), where the court held that a pension and welfare fund with six trustees, three appointed by the union and three by the employer, violated the equal representation requirement because one of the three trustees appointed by the employers happened to be a union member. The court found that under the circumstances union domination of the trust fund was a very real possibility, and enjoined the union member from serving as a trustee as long as he remained a union member.

Nevertheless, the fact that the Fund violated the equal representation requirement during the years 1948-1967 is not in itself sufficient to confer jurisdiction under Section 302(e). "[D]istrict court jurisdiction under Sec. 302(e) is limited to restraining future violations of the statute and does not include granting relief by way of accounting, receivership, or removal of defalcating trustees or administrators." Snider v. All State Administrators, Inc., 481 F. 2d 387 (5th Cir. 1973). *See also* Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd per curiam*, 387 F. 2d 955 (3d Cir. 1968). Inasmuch as plaintiffs seek no future injunctive relief with respect to the composition of the Fund's trustees, but claim instead what is in effect an accounting of the damages allegedly caused the Fund by an imbalance in the makeup of the trustees at a time almost ten years ago, Section 302(e) confers no jurisdiction in this Court over plaintiffs' claim to the extent that it is based on a violation of the equal representation requirement.

Such a result is consistent with the wording, legislative history and purpose of Section 302(e). The statute itself expressly vests jurisdiction in the district courts "to restrain violations of this section[.]" That language offers no support for plaintiffs' argument that

jurisdiction under the statute is not limited to restraining future violations. With respect to the legislative history, the Supreme Court has conclusively stated that "The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." Arroyo v. United States, 359 U.S. 419, 427 (1959). Finally, the limited purpose of the jurisdictional grant in Section 302(e) was the prevention of potential abuse, not the provision of a remedy for past abuses. Congress intended state law, under which Section 302(c)(5) trusts were to be established in the first place, to be the means of redressing wrongs which might occur in the operation or administration of a fund. *See* Snider v. All State Administrators, 481 F. 2d 387, 390 (5th Cir. 1973). As the Court of Appeals for the Seventh Circuit has stated, "Section 302 is aimed primarily at the prevention of possible abuse and not at providing a remedy for abuse actually perpetrated." Employing Plasterers' Association v. Journeymen Plasterers' Protective and Benevolent Society of Chicago, Local No. 5, 279 F. 2d 92, 97 (7th Cir. 1960).[18]

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[18] Plaintiffs' arguments to the contrary are not persuasive. They argue first that several cases have granted relief under Section 302(e) other than an injunction against future violations of the statute. For the most part the case authority cited by plaintiffs is either *dictum* (*see, e.g.*, Lewis v. Mill Ridge Coals, Inc., 298 F. 2d 552 (6th Cir. 1962)), or inapposite because it deals with the granting of relief not inconsistent with the limited jurisdictional grant of Section 302(e) (*see, e.g.*, Pidgeon v. Brunswick Port Authority, 324 F. Supp. 140 (S.D. Ga. 1971) (declaratory judgment) *and* Raymond v. Hoffmann, 284 F. Supp. 596 (E.D.Pa. 1966) (court may order transfer of funds from old fund to new fund in order to prevent old fund from structurally violating Section 302(c)(5)). To the extent that plaintiffs cite cases inconsistent with the position taken in this case, *see, e.g.*, Giordani v. Hoffman, 295 F. Supp. 463

With respect to the argument that the allegation that the Fund was not established "for the sole and exclusive benefit of the employees" vests Section 302(e) jurisdiction in this Court to grant the relief sought in this case, the short answer is that plaintiffs do not request any injunction as to future activity, but simply an award of damages on the basis of past actions and, thus, for the reasons discussed above, Section 302(e) confers no jurisdiction here. Furthermore, even if this Court had jurisdiction on the basis of the allegation that the Fund was not established for the sole and exclusive benefit of the employees, the suit would have to be dismissed for failure to state a claim, inasmuch as plaintiffs' allegations do not amount to an averment that the Fund was not established for the sole and exclusive benefit of the employees. The cases that have upheld jurisdiction on the basis of such an allegation have involved claims of improper self-dealings between a fund and a union, and active use of the trust funds for the benefit of persons other than the fund's bene-

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(E.D.Pa. 1969), those cases represent the minority view, and, in any event, are not binding on this Court Plaintiffs also argue that a broad interpretation of Section 302(e) is necessary to effectuate the policy of the National Labor Relations Act to protect the rights of individual employees in their relationships with labor organizations. Plaintiffs' rights do not remain unprotected by the position taken here, however. They simply must seek to protect those rights in another forum. Finally, plaintiffs argue that a damage remedy should be implied by reading Section 302 in conjunction with 28 U.S.C. § 1337, which provides in pertinent part: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress relating to Congress. . . ." This argument is similarly unpersuasive because it overlooks the fact that Congress has expressly limited federal jurisdiction under Section 302(e) to the granting of future injunctive relief.

ficiaries. *See, e.g.*, Giordani v. Hoffman, 295 F. Supp. 463 (E.D. Pa. 1969).[19] Here, the plaintiffs do not complain of the use of the Fund's moneys for the benefit of anyone other than the Fund's beneficiaries, but instead argue that the trustees wrongfully failed to collect moneys due the Fund. Such a claim does not amount to an allegation that the Fund was not established for the sole and exclusive benefit of the employees. Plaintiffs' claim is factually similar to the claim in Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd per curiam*, 387 F. 2d 955 (3d Cir. 1968), where plaintiffs sued for a declaratory judgment that the trustees of a Section 302(c)(5) fund had acted improperly in refusing to accept payments from some employers. Jurisdiction on the basis of Section 302(e) was found lacking in that case, and a similar conclusion is appropriate here as well.

2. *Section 301 and Pendent Jurisdiction*

The attempts to assert jurisdiction over the trustees on the basis of Section 301 and the doctrine of pendent jurisdiction can be disposed of summarily. The Section 301 [20] claim is based on the following portion of the

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[19] It should be noted here that if this Court had been confronted with the complaint in the *Giordani* case, I would not have found jurisdiction on the basis of the claim that the fund had not been established for the sole and exclusive benefit of the employees. To the extent that *Giordani* based jurisdiction on that claim, it seems to me, it permitted questions of violation of fiduciary obligations or standards of prudence to be litigated in a federal forum, something which Congress did not intend when it enacted Section 302. *See supra.*

[20] "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court

Interim Agreement of September 17, 1952 between the Union and the operators:

> "The Trustees of the Fund shall use due diligence and all reasonable means to collect and prevent delinquent obligations to the Fund." See Volume A, p. 67 of Plaintiffs' Exhibits.

This provision was incorporated by reference in all subsequent Anthracite Wage Agreements. Plaintiffs maintain that it imposed on the trustees a contractual duty to make "realistic efforts to collect delinquent royalty payments due and owing to the Fund[,]" Volume J, Plaintiffs' Trial Brief of the Law, p. 30, and that, accordingly, this Court has jurisdiction under Section 301 over the claim that the trustees failed to make such realistic efforts. Crawford v. Cianciulli, 357 F. Supp. 357 (E.D. Pa. 1973).

Plaintiffs' argument misperceives the import of the contractual provision on which it relies. In the first place, the trustees were not parties to the contract between the Union and the Operators, and therefore undertook no duties under the contract. It follows that they connot be sued for breach of contract, which is the only kind of suit that can be brought under Section 301. Moreover, the contractual language with respect to the trustees' duties is merely a statement of the trustees' existing fiduciary duties, and does not render those duties contractual in nature. This was implicitly recognized by the Court of Appeals in its earlier opinion in this case, Nedd v. Thomas, 400 F. 2d 103, 105 (3d Cir. 1968), in which the Court stated "the contract makes explicit the normal obligation of the trustees to 'use due diligence and all reasonable means to

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of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

collect and prevent delinquent obligations of the Fund.'" A suit for breach of those fiduciary duties may not be brought under Section 301. Bowers v. Ulpiano, 393 F. 2d 421 (1st Cir. 1968). The case relied on by plaintiffs in this regard, Crawford v. Cianiulli, 357 F. Supp. 357 (E.D. Pa. 1973) is not authority to the contrary. There the union trustees of a pension fund brought suit in federal court against the employer trustees of the same fund for, *inter alia*, an injunction restraining the defendants from refusing to approve pension applications and payments pursuant to already approved pension applications for former employees of two employers who were no longer contributing to the fund, and the value of whose past contributions to the fund had been exhausted. Plaintiffs in that case argued that the refusal to pay pensions to those employees violated the terms of the pension fund agreement, in that, according to those terms, the employees were eligible to receive pensions regardless of whether the value of their employers' past contributions to the fund had been exhausted. In finding jurisdiction under Section 301 insofar as the plaintiffs asserted a violation of the terms of the agreement, the court was careful to "disaffirm . . . any intention to assert jurisdiction over matters involving the fiduciary duties of the Pension Fund Committee members." *Id.*, at 367. It stated that "[t]hese are not matters concerning violations of a contract." *Id.* In the instant case, plaintiffs assert what is in essence a breach of fiduciary duties by the trustees, and not a violation of the terms of the Anthracite Wage Agreement. There is no Section 301 jurisdiction over such a claim.

With respect to the question of pendent jurisdiction over the claim against the trustees for violations of the common law of trusts, it is axiomatic that in order

for a federal court to have the power to consider state law claims under the doctrine of pendent jurisdiction, the federal claim to which the state claim is to be appended "must have substance sufficient to confer subject matter jurisdiction on the court." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). Inasmuch as there is no federal jurisdiction over either of the claims to which plaintiffs seek to append the common law claim against the trustees, it is clear that this Court does not have the power to hear the common law claim against the trustees in this case.

B. *The Claim Against the Union*

1. *Sections 301 and 302*

Plaintiffs maintain that the Union has a contractual obligation, under the Anthracite Wage Agreement, to ensure that the operators remained current in their payments to the Fund and that delinquencies were collected once they accumulated. Accordingly, they contend, there is jurisdiction under Section 301 to hear their claim that the Union has breached this contractual obligation.

At the outset, it would seem that plaintiffs' contention with respect to Section 301 jurisdiction over the Union is foreclosed by the earlier opinion of the Court of Appeals in this case, Nedd v. Thomas, 400 F. 2d 103 (3d Cir. 1968), which held that, inasmuch as the Union had no duty under the Anthracite Wage Agreement to enforce the operators' responsibility to contribute to the Fund, its alleged actions in this case could not be a breach of a contract between an employer and a labor organization. *Id.*, at 105. Plaintiffs, nevertheless, argue that the opinion of the Court of Appeals is not dispositive of this issue because there is additional matter, not considered by the Court of

Appeals, which makes it clear that the Union had a contractual duty to enforce the operators' responsibility to contribute to the Fund. Specifically, plaintiffs point to a provision of the May 7, 1936 Anthracite Wage Agreement, which provides as follows:

"VIOLATIONS OF AGREEMENT

"(7) It is understood and agreed that the District and International Officers of the United Mine Workers of America assume full responsibility for carrying out the provisions of this Agreement. To that end they shall use every power vested in them to require that grievances be taken up in the manner provided in the Agreement and to prevent illegal strikes in violation thereof; and for non-compliance with the instructions of said officers in this regard, upon the part of any member or members of the United Mine Workers of America, said officers shall impose such discipline as may be necessary to prevent violations and to secure compliance with the provisions of this Agreement."

Focusing on the first sentence of the quoted provision and on the language of subsequent Anthracite Wage Agreements incorporating prior agreements, plaintiffs argue that the Union did indeed undertake an obligation under the contract to enforce the operators' responsibility to contribute to the Fund.

Without deciding the factual issue of whether the Court of Appeals had before it the portion of the 1936 agreement on which plaintiffs rely here,[21] or the legal

[21] With respect to what was considered on appeal, the Court of Appeals stated, "In determining the essential character of the suit and whether the defendant was entitled to summary judgment we consider the original complaint, proposed amplifying amendments which the plaintiffs have submitted during

issue of whether, if the Court of Appeals did not have that portion of the agreement before it on appeal, plaintiffs should be permitted to rely on it now with no explanation of why it was not introduced prior to this stage of the proceedings, I nevertheless conclude that the relevant portion of the 1936 agreement does not impose a contractual duty upon the Union to enforce the operators' responsibility to contribute to the Fund, and that, therefore, the Court of Appeals holding that there is no Section 301 jurisdiction over the claim against the Union is dispositive. The clause appears to be a standard provision emphasizing the responsibility of the Union to see to it that its membership abides by the terms of the contract. As the second sentence of the above-quoted portion of the 1936 agreement reveals, the undertaking of the Union was one made to the employers to prevent illegal work stoppages by seeing to it that grievances were processed pursuant to the agreement and by agreeing to impose discipline on its members if necessary to prevent a violation of the agreement. Accordingly, the language incorporating the provisions of prior agreements [22]

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this appeal, and the pertinent language of a collective bargaining contract between an association of anthracite coal operators . . . and the defendant United Mine Workers. . . ." Nedd v. Thomas, *supra*, at 104. It cannot be determined from this language whether the relevant portion of the 1936 agreement was considered by the Court of Appeals.

[22] The 1946 collective bargaining agreement, in which the Fund was first established, contains language incorporating the provisions of previous agreements. This language appears in the preface to the entire agreement, however, and not in the section creating the Fund. Thus the possibility seems remote that the parties intended the general provision of the 1936 agreement concerning the Union's responsibility for carrying out the provision of the agreement to apply to the obligation to contribute to the Fund. Moreover, a close reading of the 1946 agreement suggests that the parties did not even incorporate the 1936 provision regarding enforcement of the agreement into the 1946 version. The general incorporating language of the 1946 agreement provides that previous agreements are incorporated "except as hereinafter modified, supplemented and amended." Plaintiffs' Exhibit N, Pages 124-125. A subsequent provision of the 1946 agreement provides:

"7. Miscellaneous

(a) In lieu of existing contractual obligations affecting the same subject matter, the United Mine Workers of America reaffirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this Agreement." Plaintiffs' Exhibit N, p. 132.

This latter provision suggests two conclusions. The first is that the broad language of the 1936 agreement by which the Union "assume[d] full responsibility for carrying out the provisions of this Agreement[,]" was replaced in the 1946 agreement by the above more circumscribed language. Thus, the major premise of plaintiffs' argument here, that the broad language of the 1936 agreement was incorporated into the 1946 and subsequent agreements, does not seem to exist. Second, the fact that the 1946 agreement clearly only obligates the Union to do its best to prevent stoppages of work pending adjudication of disputes indicates that the undertaking of the 1936 agreement, in spite of the breadth of the language, had the same limited intention behind it with respect to the Union's obligations as the 1946 agreement had. The purpose of the 1946 amendment of that obligation seems to have been to bring the language of the agreement in line with the limited intent of the parties.

cannot reasonably be interpreted as having been intended to impose upon the Union the responsibility for collecting debts owing to the Fund. In addition, the language which first appeared in the September 17, 1952 Interim Agreement iterating the trustees' duty to "use due diligence and all reasonable means to collect and prevent delinquent obligations to the Fund[,]" indicates that the parties understood that it

was the responsibility of the trustees, and not the Union, to enforce the operators' obligations regarding the Fund. In sum, the parties did not intend, by virtue of the language in the 1936 agreement concerning the responsibility for carrying out the provisions of the agreement and the general incorporating language of subsequent agreements, to impose upon the Union any obligations with respect to the Fund. Accordingly, the holding of the Court of Appeals that there is no Section 301 jurisdiction over the claim against the Union is binding here as the law of the case.

Plaintiffs' attempt to assert jurisdiction over the claim against the Union under Section 302 must be rejected for the reasons articulated, *supra*, in the discussion concerning jurisdiction over the claim against the trustees.

2. *Duty of Fair Representation and Pendent Jurisdiction*

In its earlier opinion in this case, the Court of Appeals stated:

> "This does not mean that the conduct attributed to the Union is not wrongful. It may well constitute a breach of the union's equitable duty as a fiduciary representative of employees to act in their interest, fairly and in good faith, and without unreasonable discrimination throughout the area in which it has been empowered to function. Cf. Vaca v. Sipes, 1967, 386 U.S. 171 . . ." Nedd v. Thomas, 400 F. 2d 103, 105-106 (3d Cir. 1968). ". . . [H]ere it is alleged that the union entered into published contracts that undertake to protect the interests of retired workers, while the union secretly acted to the contrary. Such facts, if proven, would raise a serious question as to

> whether the union had breached its duty of fair representation." *Id.*, at 105-106, fn. 5.

Seizing upon this language, plaintiffs maintain that this Court has jurisdiction insofar as the complaint alleges a violation by the Union of its duty of fair representation. Defendants counter that the Supreme Court has subsequently established conclusively that the statutory duty of fair representation does not extend to retirees, Allied Chemical and Alkalai Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), and that, accordingly, federal jurisdiction of this case cannot be based on the duty of fair representation. An analysis of the duty and the cases which apply it discloses that the defendants' position is correct.

The duty of fair representation is a court-created correlative to Section 9(a) of the National Labor Relations Act, and the corresponding provision of the Railway Labor Act, which provide that the collective bargaining representative selected by the majority of the employees in a collective bargaining unit "shall be the **exclusive** representative of all the employees in such unit . . ." 29 U.S.C. § 159(a) (emphasis supplied). The duty of fair representation counterbalances the power vested in a union by the exclusivity of its representation, and, in essence, acts to safeguard the right of minority groups of employees represented by a union by providing that the union shall not discriminate against any of the employees whom it represents. See Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 151-152 (1957). It "imposes on the union an obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Brady v. Trans World Airlines, Inc., 401 F. 2d 87, 94 (3d Cir.

1968), *cert. denied*, 393 U.S. 1048, *reh. denied*, 394 U.S. 955 (1969).

Although the duty was initially articulated by the courts in cases dealing with the negotiation by unions of collective bargaining agreements that discriminated on the basis of race against some of the employees represented by the unions, *see e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), *and* Syres v. Local 23, Oil Workers International Union, 350 U.S. 982, *reversing* 223 F. 2d 739 (5th Cir. 1955), it is now recognized that the duty "encompasses all forms of hostile discrimination[,]" Brady v. Trans World Airlines, Inc., *supra*, at 94, and extends not only to the negotiation of collective bargaining agreements, but also to the administration and enforcement of such agreements. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1963). It is "well established" that the federal courts have subject matter jurisdiction to enforce the duty. Brady v. Trans World Airlines, *supra*, at 94.

At the time that the Court of Appeals indicated that the complaint in this case might state a federal cause of action for breach of the duty of fair representation, it was still an open question whether the duty extended to retirees. That question has apparently been answered by the Supreme Court in Allied Chemical & Alkalai Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). That case involved a union which upon the enactment of Medicare sought midterm bargaining to renegotiate the insurance benefits for retired employees. When the company refused to bargain about the matter, the union brought unfair labor practice charges against the company with the National Labor Relations Board (NLRB). The NLRB concluded that the company had violated Section 8(a)(5) of the NLRA, 29 U.S.C. § 158 (a)(5), which, together with other sections of the

NLRA, establishes the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with "the representatives of his employees" designated or selected by the majority "in a unit appropriate for such purposes." The Supreme Court reversed, holding, *inter alia*, that retirees' benefits were not mandatory subjects of collective bargaining. *Id.*, at 182. In the course of its opinion, the Supreme Court held that retirees are not "employees" included within the collective bargaining unit described in Section 9(a) of the NLRA, 29 U.S.C. § 159(a), because active and retired employees "plainly do not share a community of interests broad enough to justify inclusion of the retirees in the bargaining unit[,]" *Id.*, at 173, and held that the subject of retirees benefits does not sufficiently affect the "terms and conditions" of the employment of active workers to render it a mandatory topic of collective bargaining. *Id.*, at 182. In the context of these latter two holdings, the Court specifically addressed the effect of its decision on the duty of fair representation:

> "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer. Nothing in *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952), is to the contrary. In *Howard* we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The reach and rationale of *Howard* are a matter of some conjecture. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 157-159 (1957). But whatever its theory, the case obviously does not require a

> union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." Allied Chemical & Alkalai Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181, fn. 20 (1971).

Plaintiffs in this case being retirees, and thus, under the *Pittsburgh Plate Glass* case, not members of the bargaining unit to whom the Union's duty of fair representation extends, and plaintiffs' claim being concerned exclusively with pension benefits, the conclusion seems inevitable that there can be no federal jurisdiction of this case for breach of the duty of fair representation.

Plaintiffs, however, seek to avoid the conclusion seemingly compelled by *Pittsburgh Plate Glass*. They argue first that because the Union has in fact acted as the pensioners' exclusive bargaining agent with the operators and has been recognized as such by both the Union and the pensioners, the Union should be held to the duty of fair representation. "To hold a union acting as an exclusive bargaining agent for any group to any duty less than fair representation would destroy the very basis of federal labor policy." Volume J, Plaintiffs' Trial Brief of the Law, p. 52. The abrupt answer to this contention is one given to a similar argument which was made in the *Pittsburgh Plate Glass* case: ". . . [I]ndustrial practice cannot alter the conclusion . . . that retirees are neither 'employees' nor bargaining unit members. . . . Common practice cannot change the law and make into bargaining unit 'employees' those who are not." Allied Chemical & Alkalai Workers of America v. Pittsburgh Plate Glass Co., *supra*, at 176. More to the point, federal labor policy does not necessarily require that a union which acts as

the exclusive bargaining agent for retirees be held to the statutory duty of fair representation. The power which an exclusive bargaining representative possessed by such a representative with respect to the inless comprehensive and extensive than the power possessed by such a representative with respect to the interests of active workers. The only significant function which a union may perform for a retiree is negotiation concerning such retirement benefits as pension and welfare payments.[23] The extent to which a union acts on behalf of active employees, by contrast, is far greater. The union bargains and presents grievances with respect to all significant terms and conditions of employment, and, generally, the employer may not unilaterally change any terms or conditions of employment without the assent of the union. The employer is also forbidden to negotiate terms of employment with individual employees—even a numerical majority—as long as they have a bargaining representative. *See*

[23] This in fact occurred on several occasions in the history of this case, when the Union negotiated the creation of the Fund in the first place, and when it bargained for increases in the rate of royalty payments. It should also be noted in connection with this point that, under the federal statutory scheme, a bargaining representative as such plays no direct role in the administration of pension and welfare trusts for retirees. Although the union is to be equally represented with the employer in the administration of such a trust, Section 302(c)(5)(B), it is the trustees, acting independently of the union and the employer and subject to the standards of fiduciary responsibility imposed by the law of the state in which the trust is located, and not the union, who administer the trust. Furthermore, the possibility that a union may unlawfully control the administration of a trust, as is alleged in this case, does not call for holding the union to the statutory duty of fair representation as a remedy. Congress has provided an injunctive remedy to prevent such possible abuse (Section 302(e)), and has determined that state law should remedy any damage actually caused by such control. *See* discussion *supra*.

generally, Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 152 (1957). In short, employees place in the hands of their bargaining representative all their rights, interests and concerns with respect to the terms and conditions of their employment. It was to guard against the abuse of such power in the hands of unions that the duty of fair representation was created. The lesser power that a union possesses with respect to the rights and interests of retirees does not necessarily call for the imposition of a federal duty of fair representation, and the Supreme Court's opinion in the Pittsburgh Plate Glass case is a recognition of that fact.

Plaintiffs next seek to distinguish *Pittsburgh Plate Glass* by pointing out that the Supreme Court in that case noted that a union may bargain for its retirees if the employer is willing to do so. From this plaintiffs would conclude that a union which does in fact bargain for its retirees should be held to the duty of fair representation. This argument is similar to the first one, and must be rejected for the same reasons. First, while the Court in *Pittsburgh Plate Glass* did note that a union may permissibly bargain for retirees if the employer agrees, it did not indicate that under such circumstances the union would be held to the duty of fair representation in order to protect the retirees. Indeed, the Court addressed itself to the issue of what protection the retirees would have under those circumstances, and did not mention the duty of fair representation. The Court stated:

> "This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, Col. L. Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed." Allied Chemical & Alkalai Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181, fn. 20 (1971).

Second, the fact that a union bargains for retirees does not invest the union with such power over the rights and interests of the retirees as to call for the imposition of the duty of fair representation. *See* discussion *supra*.

Finally, plaintiffs maintain that "subsection 302(c)(5) subjects the Union to an explicit statutory duty to represent its retired employees with respect to the administration of § 302 trust funds[,]" Volume J, p. 52, and argue that "it would be intolerable if any obligation less than the duty of fair representation were to be applied to the union with respect to its exclusive representation of its retirees under a § 302 trust fund . . ." *Id.*, at 54. This argument is based on an unacceptable premise. As discussed in footnote 23, *supra*, a union is not directed to represent its retired employees in the administration of a Section 302 trust, but only to furnish representatives in a number equal to that furnished by the employer to administer the trust. Those representatives, in their independent role as trustees, and not the union, are obligated to administer the trust. The Supreme Court recognized this fact in *Pittsburgh Plate Glass* in the course of rejecting an argument similar to the one made here. The Court stated, ". . . [T]he union's role in the administration of the fund [a Section 302 fund] is of a far different order from its duties as a collective bargaining agent." Allied Chemical & Alkalai Workers of America v. Pittsburgh Plate Glass Co., *supra*, at

170. The limited role contemplated for a union in Section 302 does not call for imposition of the duty of fair representation.

Thus, primarily for reasons articulated in the *Pittsburgh Plate Glass* case, a union's duty of fair representation does not extend to retirees and, consequently, does not furnish federal jurisdiction of this case. Furthermore, because there is no independent federal jurisdiction over the claim against the Union, there can be no pendent jurisdiction over the plaintiffs' common law claims. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *See* discussion *supra* regarding pendent jurisdiction over the claim against the trustees. In sum, therefore, it is the holding of this court that there is no federal jurisdiction of this case, and that, accordingly, the suit must be dismissed.

If at first this conclusion seems unduly harsh because of the large amounts of time and effort invested in this case by all concerned, it must nevertheless be pointed out that this lawsuit is in essence a claim that the trustees committed a breach of trust by failing to afford the beneficiaries their undivided loyalty in their management of the Fund and by failing to exercise due diligence to collect royalty payments due the Fund; and a claim that the Union either induced or participated in that breach of trust in order to further its own interests. Those are common law claims concerning the administration of a trust, *see generally*, Restatement of Trusts 2d §§ 170(1), 177, 326 (1959), to be adjudicated according to the law of the state in which the trust fund is located, in this case Pennsylvania. As discussed, *supra*, the statute which permits employers to make contributions to such funds without violating the general federal prohibition against employer payments to employee representatives, Section 302, contemplates that such claims are to be brought in state courts. Thus the conclusion that there is no federal jurisdiction of this case is consistent with the overall Congressional scheme with respect to pension and welfare trust funds. Moreover, the existence of federal jurisdiction is not to be determined according to the amount of time and effort that have been expended on the question, but according to the provisions of the Constitution regarding the jurisdictional power of the federal courts and the jurisdictional grants by Congress. It must be remembered that federal courts are courts of limited jurisdiction, and that "[t]he presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists." Wright & Miller, Federal Practice & Procedure: Civil § 3522, p. 45. Because plaintiffs have not demonstrated that Congress has granted jurisdiction to adjudicate the claims presented in this case, the conclusion that this court does not have jurisdiction must follow. Finally, to the extent that it is argued that union-management negotiated pension funds are primarily matters of federal concern and that the federal courts should establish a federal common law pertaining to pension and welfare trust funds similar to the federal common law over collective bargaining agreements which evolved as a result of the Supreme Court's decision in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), *see* Crawford v. Cianciulli 357 F. Supp. 357, 360 (E.D. Pa. 1973), the argument must be directed to another forum. "Without guidance by the Supreme Court we do not have authority to establish such a federal common law for union-management negotiated pension fund agreements." *Id.*, at 361. Accordingly, this Court finds itself without power to hear this case.

Notwithstanding the jurisdictional conclusions hereinbefore articulated, in order to completely fulfill this Court's responsibilities as a trial court and to ensure a final resolution of this protracted lawsuit in the event that an appellate court determines that there is federal jurisdiction here, I will address myself to the question whether, assuming federal jurisdiction of the issues in this case, plaintiffs are entitled to relief.

IV. *Statute of Limitations*

This lawsuit was filed on January 21, 1965, and seeks to establish liability for defendants' actions beginning in 1954. Pointing to these facts, defendants contend that, under the applicable law, a six-year statute of limitations applies to all of plaintiffs claims, and that, accordingly, to the extent that those claims are based on alleged actions prior to January 21, 1959, they are barred as untimely. Furthermore, defendants argue, the operative facts of the claims accruing after January 21, 1959 occurred prior to that date, and for that reason all of plaintiffs' claims should be barred by the statute of limitations. Plaintiffs agree that a six-year statute of limitations applies to most of their claims, but maintain that it was tolled by the defendants' failure to disclose the facts upon which the case is premised.

With respect to the questions of what limitations standard and period apply to this case, both parties agree that the federal claims, being based on statutes for which Congress provided no limitations period, are to be governed by the most analogous state statute of limitations, *see* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966), and that, for the Section 301 and duty of fair representation claims, the Pennsylvania statute, which provides a six-year limitation on all actions based upon breach of contract and torts not resulting in personal injury, controls, 12 P.S. § 31. Falsetti v. Local Union No. 2026, United Mine Workers of America, 355 F. 2d 658 (3d Cir. 1966). Although there is no case law regarding the most appropriate limitations provision for a Section 302 suit, the parties agree that the six-year period of 12 P.S. §31 should apply to that claim as well. While no Pennsylvania statute of limitations seems completely appropriate for a Section 302 "structural violations" suit, the six-year provision for actions based based upon breach of contract and torts not resulting in personal injury seems less inappropriate than any other limitations provision, and, particularly in view of the parties' agreement, will be adopted for purposes of this suit.

The parties disagree about the proper limitations standard for the claims based on state law. On the one hand, plaintiffs argue that because these claims are essentially to redress breaches of trust, they sound in equity, and, therefore, only the doctrine of laches should apply. Blankenship v. Boyle, 329 F. Supp. 1089, 1112 (D.D.C. 1971). Defendants, on the other hand, maintain that courts of equity customarily follow the statute of limitations for the corresponding action at law in cases where essentially legal relief, such as damages or an accounting, is sought; that this is the governing rule in Pennsylvania; and that, accordingly, the state law claims should also be controlled by the six-year statute of limitations. Upon analysis, the defendants' position appears correct. As they point out, Pennsylvania courts of equity generally apply the statute of limitations which controls the analogous proceeding at law, particularly when relief such as damages or an accounting is sought. Ebbert v. Plymouth Oil Co., 348

Pa. 129, 134 (1943) (six-year statute applies to action seeking an accounting against a corporation and its officers and directors for improper expenditure of company funds in defending a legal action against the company and the individual officers and directors of the company; the complaint alleged that most of the fees paid to the lawyers were in fact paid for the benefit of the individual officers and directors and therefore constituted an unlawful diversion of corporate funds). *See also* Overfield v. Pennroad Corporation, 146 F. 2d 889, 895 (3d Cir. 1944), a diversity case in which the Court expressly followed the *Ebbert* case in a shareholder's derivative action in equity against directors for an accounting for breach of fiduciary duty and for failure to enforce their company's legal claims against others. Furthermore, the court in *Blankenship v. Boyle*, the case cited by plaintiffs in support of their argument that laches should be applied to the state claims here, acknowledged that it was following a minority rule when it applied laches in a diversity case in which plaintiffs sought damages and an accounting for various breaches of trust. Blankenship v. Boyle, 329 F. Supp. 1089, 1112 (D. D.C. 1971). I conclude, therefore, that a six-year statute of limitations applies to all of plaintiffs' claims. The question remains when that statute began to run in this case.

Pennsylvania and federal law both provide that the statute of limitations for an action alleging breach of trust or violation of a fiduciary duty does not begin to run until the alleged wrongdoings have been or should have been discovered by the plaintiff. Pennsylvania Company for Insurance on Lives and Granting Annuities v. Ninth Bank and Trust Co., 306 Pa. 148, 155 (1932); Wosche v. Kraning, 353 Pa. 481, 486 (1946); Deboles v. Trans World Airlines, Inc., 350 F. Supp. 1274, 1290 (E.D. Pa. 1972); Tobacco and Allied Stocks

v. Transamerica Corp., 143 F Supp. 323, 328 (D. Del. 1956), *aff'd*, 244 F 2d 902 (3d Cir. 1957). *See generally, Developments in the Law—Statutes of Limitation*, 63 Harv. L. Rev. 1177, 1215 (1950). In the instant case, plaintiffs maintain that the statute of limitations was tolled until December 14, 1961 "by the defendants' active concealment of the facts upon which plaintiffs base this action." Plaintiffs' Reply Brief Concerning All Parties' Requests for Findings of Fact and Conclusions of Law, at 37. In support of their contention, plaintiffs argue that the defendants purposefully concealed the facts concerning operator delinquencies, and that because of the concealment, plaintiffs did not suspect any wrongdoing on the part of the defendants until December 14, 1961, when they met with Fund trustee and then Union president Thomas Kennedy in an effort to learn what the Fund's problems were. Plaintiffs thus appeal to the doctrine of fraudulent concealment to postpone the running of the statute of limitations in this case. *See Developments in the Law—Statutes of Limitations, supra*, at 1220-1222 for a discussion of the doctrine of fraudulent concealment. Generally, that doctrine calls for a tolling of the statute of limitations only when the defendant intends to conceal the plaintiff's cause of action, and is successful in preventing the plaintiff from discovering any wrongdoing. *See id.*, at 1221 n. 356.[24] While the

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[24] Plaintiffs also argue that the statute of limitations was tolled by the filing of the diversity action in the Eastern District of Pennsylvania on December 11, 1963, and that, therefore, under any circumstances, the proper cut-off date should be December 11, 1957, and not January 21, 1959, as defendants contend. Defendants on the other hand maintain that the filing of the 1963 suit did not toll the statute. In view of the finding that the statute did not begin to run until December 14, 1961, *see infra*, it is not necessary to determine whether the filing of the 1963 suit tolled the statute.

facts of this case do support a finding that the statute of limitations did not begin to run until December 14, 1961, the date plaintiffs propose, *see infra*, it is not because of the doctrine of fraudulent concealment as plaintiffs argue, but on the basis of another rule.

Turning to the facts relevant to the statute of limitations issue, the most significant are the trustees' actions on the two occasions during the 1950s when the Fund's monthly pension payment was reduced, which are the two occasions during that decade when the plaintiffs could most likely have been expected to question the activities of the trustees. On both occasions, the trustees did not disclose the extent to which operator delinquencies had contributed to the Fund's financial problems, and misrepresented that contribution by attributing the Fund's predicament solely to a decline in production. In a letter dated January 16, 1954 from the Fund's Executive Secretary to the beneficiaries announcing the decision to reduce the monthly pension from $100 to $50, the sole explanation given for the decline in Fund income which necessitated the reduction in benefits was the drop in anthracite production between the years 1946 and 1953. The first paragraph of that letter is illustrative:

> "The Anthracite Health and Welfare Fund is financed by payments into the Fund on the basis of 50¢ per ton on each ton of coal produced for use or sale. Reports from the Pennsylvania Department of Mines show that nearly sixty-two million tons of anthracite were mined when the Fund was established in 1946, and production has declined during the period of the last six years to such a point that only about thirty million tons were produced in 1953. This decline of approximately thirty-two million tons has had a disastrous effect upon the finances of the Anthracite

> Health and Welfare Fund." Plaintiffs' Exhibits, Volume D, p. 104.

The same information was contained in a radio and television release the following week. Neither the letter nor the release mentioned the fact that operator delinquencies had contributed to the shortage of funds, although, at the time, such delinquencies totalled almost $5,000,000. On the next occasion when the pension payment was reduced, June 24, 1958, a letter to the beneficiaries from the Fund's Executive Secretary, Mart F. Brennan, also attributed the reduction solely to production decline and did not disclose any information concerning operator delinquencies, which at the time were in excess of $8,000,000.

In addition, on the few occasions in the fifties when the subject of operator delinquencies was raised, the trustees downplayed and misrepresented their extent and significance. In Newspaper articles of January 20 and 21, 1954 containing charges by Glen O. Kidd, president of the Lehigh Navigation Coal Co., of substantial delinquencies on the part of other coal operators, Trustee Kennedy is quoted as labeling Mr. Kidd's charges as "irresponsible and distorted." The aritcles go on to quote Kennedy as stating:

> "Companies delinquent to the fund are confined to a relatively few concerns and the situation as effecting these few companies has improved within recent months." Plaintiffs' Exhibits, Volume D, p. 109.

At the time, however, operator delinquencies were almost $5,000,000.

In April of 1956, Trustee Kennedy issued the following public statement:

> "Of course there are delinquent accounts but practically all of them have been adjusted on the basis of the companies paying currently and in

addition thereto making payments on back amounts due. Every one of these companies is now current." Plaintiffs' Exhibits, Volume D, p. 117.

At the time, however, according to the reports of the Fund for March, 1956, of the 97 companies reported upon, 78 were delinquent in amounts over $1,000 and 18 in amounts over $100,000. Several major companies had large delinquencies: Gilberton, $494,539.30; Hammond Coal Company, $505,116.95; Kehoe Berge, $323,-110.32; Pagnotti Coal Company, $1,618,503.75; and St. Clair Coal Company, $1,061,175.12.

Finally, on several occasions during the fifties, the pensioners were told that the trustees were doing "everything humanly possible" and "everything within their power" to bring about increased pensions and keep all companies current in their royalty payments. Particularly because the trustees were fiduciaries in whom the pensioners were expected to and did repose their trust and confidence, and the pensioners had been given no cause to suspect the trustees' representation of the Fund's financial situation, the inevitable effect of the statements of the 1950s was to prevent the pensioners from making any inquiries on their own into the Fund's financial condition.[25]

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[25] The plaintiffs maintain that the Union participated with the trustees in preventing them from learning the facts about operator delinquencies sooner than December, 1961. However, I find scant support for this contention in the record. The mere fact that Trustees Brennan and Kennedy happened to also be Union officials at the time they issued statements that had the effect of misleading the pensioners does not implicate the Union in that conduct. As plaintiffs themselves acknowledge, the simple fact that some of the trustees happened to also be Union officials does not warrant attributing their conduct as trustees to the Union. *See* A Short Summary of Plaintiffs' Case on the Facts and Answers to Three Questions, at 9. Furthermore, the trustees' reluctance to publicize the arrearages and the identity of the delinquent operators was consistent with their overall tolerant approach to the problem of operator delinquencies by which they attempted to solve the problem without worsening it by putting large numbers of companies out of business. *See infra*. The plaintiffs point to only one statement by a non-trustee Union official prior to December, 1961, in support of their contention that the Union helped to prevent their discovery of the wrongdoing alleged in this case. That is an April 1956 statement of August J. Lippi, at the time the President of District 1, United Mine Workers of America, which contains the following excerpt:

> "I am informed by the trustees of the Anthracite Health and Welfare Fund and the International headquarters of the United Mine Workers of America that all anthracite producing companies of any substance except the Glen Alden Corporation are current in their payments to the Fund and that those in arrears are picking up their back installments." Plaintiffs' Exhibits, Volume D, p. 115.

That statement, however, unlike the statements of Trustees Kennedy and Brennan noted *supra*, was not likely to have had the effect of misleading the pensioners for at least two reasons. First, there is no evidence in the record that Lippi's statement was ever publicized, and thus there is no basis for concluding that the pensioners ever heard or read it. Furthermore, even assuming that the statement was made public, it is still unlikely that the pensioners were ever aware of it, or, if they were, that they were mislead by it. That is because the statement was not aimed at the pensioners, but at the Glen Alden Coal Company, which at that time had substantial arrearages. Following the above-quoted excerpt, the statement goes on to cite a Glen Alden delinquency of more than $500,-000, and to conclude: "The issue is clear: The Glen Alden Corporation has deliberately decided to repudiate its obligations to the Anthracite Health and Welfare Fund and the thousands of persons dependent upon benefits received from the Fund." *Id.*, at 116. In sum, I find that the Union did not join with the trustees in preventing the pensioners from learning the facts about operator delinquencies sooner than December, 1961.

In view of these actions, I conclude that the plaintiffs' representation that they did not suspect any

wrongdoing until the December 14, 1961, meeting with Thomas Kennedy is correct. That meeting occurred as a result of the persistent efforts of plaintiff Nedd and other members of the Panther Valley Protest Committee; Mr. Kennedy, who at the time was both Union president and Fund trustee, resisted several attempts in mid and late 1961 to schedule a meeting, but finally agreed to one on December 14. At the meeting, Kennedy appeared annoyed and evasive in response to the pensioners' attempts to learn of the status of the Fund. He refused to permit the pensioners' secretary, who had accompanied the miners in order to record the proceedings, to attend the meeting, and declined to answer several of the pensioners' questions. He specifically refused to answer any questions concerning the identity of delinquent operators or the amount of delinquencies. The inevitable effect of Kennedy's evasiveness was to make the plaintiffs suspicious. That their suspicions were first raised by the meeting with Kennedy is borne out by subsequent events. It was shortly after the meeting, in August of 1962, that plaintiffs formally retained counsel, and it was only upon review by counsel in late 1962 and 1963 of reports relating to coal production on file with the state of Pennsylvania that plaintiffs learned of the extent of the delinquencies and the identity of the major delinquent operators.

Plaintiffs maintain that the above facts establish that the defendants purposefully concealed the facts concerning operator delinquencies in order to prevent them from discovering their cause of action. I do not find that the record supports such a harsh conclusion regarding the trustees' failure to disclose the extent to which operator delinquencies contributed to the Fund's financial problems. The trustees did not act in that regard with the intention of concealing the fact that the plaintiffs had a cause of action, or of covering up

any wrongdoing on their part. Instead, their decision not to disclose the extent of operator arrearages and not to divulge the identity of delinquent operators was caused by their conviction that the problem of delinquencies could be better handled within the industry itself. They regarded it as a problem primarily created by a declining demand for Anthracite which they with excessive optimism hoped would reverse itself, and one which publicizing would only exacerbate by stirring up antagonisms and criticisms before they had had full opportunity to remedy it. It was not because they wanted to conceal a situation for which they believed they were at fault, but because they did not want to worsen a bad situation before they had been able to correct it. A 1951 letter from Trustee Kennedy to the recording secretary of a local union reflects this purpose on the part of the trustees. The letter provides in pertinent part:

> "So far, the Trustees of the Fund have not made public the names of the companies which are in arrears. We feel that it would be unwise and not in the best interest of the Fund or the membership of the organization to make these matters publicly known, especially at this time when we are in the process of attempting to bring these delinquents up to date." Volume G, p. 103.

The decision not to disclose the extent of operator delinquencies when reductions in pension payments were announced in the 1950s, and the efforts to minimize the extent of arrearages and to avoid disclosure of the identities of delinquent operators were consistent with this purpose.[26]

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[26] While the trustees showed an uncomplimentary annoyance with the plaintiffs' persistent inquiries concerning the Fund in the early 1960s, as evidenced by Kennedy's actions

Thus, the record does not support plaintiffs' contention that the defendants fraudulently concealed the facts underlying the cause of action asserted in this case. This conclusion, however, does not mean that the statute of limitations was not tolled until December 14, 1961 as plaintiffs maintain. The record does establish that the plaintiffs did not suspect any wrongdoing by the defendants until the meeting with Thomas Kennedy on that date. Moreover, the plaintiffs failed to suspect any wrongdoing sooner than that because of the trustees' policy of not disclosing the extent of operator arrearages or the identity of delinquent operators. The fact that the trustees' policy of non-disclosure was not motivated by a desire to conceal the plaintiffs' cause of action does not mean that the statute of limitations was not tolled. The law provides that the statute does not begin to run until the alleged wrongdoings have been or should have been discovered by the plaintiff. *See supra.* Acts by a defendant which prevent a plaintiff from discovering an alleged cause of action, regardless of their motivation, can postpone the running of the statute of limitations. *See, e.g.*, Phillips Petroleum Co. v. Johnson, 155 F. 2d 185 (5th Cir.), *cert. denied*, 329 U.S. 730 (1946) (defendant-lessee innocently underpaid gas royalties, but because the facts were peculiarly within its knowledge, the running of the statute of limitations was tolled until the plaintiff discovered the underpayment). *See also, Developments in the Law—Statutes of Limitations, supra*, at 1222-1224. This is particularly true in a trust relationship, where, as in this case, the beneficiaries leave

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during the December 14, 1961 meeting with several of the pensioners, I am unwilling to regard that stance as converting their original purpose into one of deliberately concealing plaintiffs' cause of action.

the handling of their interests in the hands of their fiduciaries. *See, e.g.*, Tobacco and Allied Stocks v. Transamerica Corp., 143 F. Supp. 323, 329 (D. Del. 1956), *aff'd*, 244 F. 2d 902 (3d Cir. 1957). Under those circumstances, the beneficiaries may not be expected to discover an alleged cause of action until they have affirmatively been given cause to suspect wrongdoing. As plaintiffs in the instant suit did not receive such affirmative cause until the December 14, 1961 meeting with Thomas Kennedy, I hold that the statute of limitations did not begin to run until that date. As this action was filed on January 21, 1965, well within the six-year limitations period, it is not barred as untimely.

Defendants' arguments to the contrary are not persuasive. They argue first that the beneficiaries were kept well informed of the fact that the Fund had insufficient revenues and was in financial difficulty almost from its inception. From this they conclude that plaintiffs should have taken it upon themselves to investigate the Fund's finances and learn of the delinquencies. As has already been pointed out, however, the plaintiffs were actually misled by the trustees' communications concerning the financial status of the Fund, in that those communications attributed the financial problems solely to the decline in production and did not disclose anything concerning operator delinquencies. In addition, plaintiffs understandably relied on the trustees' assertions that they were doing everything possible to alleviate the Fund's problems. The trustees were fiduciaries who were supposed to be acting on plaintiffs' behalf in these matters, and as far as plaintiffs knew, the only meaningful problem was a drastic decline in production, something they could do nothing about in any event.

Defendants next argue that because production statistics were matters of public record, plaintiffs were

on constructive notice as to the status of operator delinquencies, inasmuch as they could have consulted these statistics, and, by comparing them with Fund revenues, learned that there were massive delinquencies. In connection with this argument, defendants point to three separate sets of public records of coal production,[27] and the fact that plaintiffs' counsel actually resorted to these records to make their initial calculations of the delinquencies in the early sixties. Defendants offer United States v. Christopher, 71 F. 2d 764 (10th Cir. 1934) in support of the contention that plaintiffs were on constructive notice by virtue of the public records concerning coal

[27] These are (1) reports on file with the Pennsylvania Department of Mines and Mineral Industries (Department of Mines reports), which list, *inter alia*, the operators producing fifty thousand or more tons annually, in the order of their production, together with the reported amount of production for each company. It was these reports which plaintiffs' counsel actually used in 1962 and 1963 to initially compute the amounts of delinquencies of the largest companies; (2) the annual Fund audit, which lists the total operator payments for each year, albeit not on an individual company basis, and, during the years 1959-1968, contained the entry "Significant Unrecorded Assets: Delinquent Employer contribtuions in an unascertainable amount." These audits were not published, however, and, although it is true that certain pensioners, including members of plaintiff Protest Committee, requested and received copies of these audits, there is no evidence that this occurred prior to the early sixties; and (3) United States Department of Labor Forms D-2 Employee Welfare and Pension Benefit Plan Annual Report, filed during the years 1959-1968 with the Department of Labor in Washington, D.C., and on file in that office. The reports for the years 1959-1961 contain the entry "Significant Unrecorded Assets: Employer contributions due over and above amounts reported to the Fund and delinquent employer contributions in an unascertainable amount (due to the fact that employer records are not all made available to Fund investigators.)"

production. That case, however, is inapposite here. It was an equitable action brought by the government, after the statute of limitations had run, to cancel a homestead patent on the ground that the patentee, at the time he was issued the patent, had already owned more than the maximum amount of land permitted to be owned by persons to whom land is sold under the Homestead Act. The government pleaded that fraudulent concealment by the patentee as to the amount of land he owned tolled the running of the statute of limitations. The court found that the patentee's deed of the prior owned land had been on record at the time of the homestead conveyance by the government, and held that his misrepresentation as to the amount of land he owned did not toll the statute of limitations because the government was on constructive notice of the recorded deed. Thus, *Christopher* was a case involving real estate and the well-settled law regarding the constructive notice that is furnished all interested persons by a deed to real property that has been properly recorded by the county recorder of deeds. It does not apply to records of coal production on file with the state and federal governments. Furthermore, that case involved a knowledgeable plaintiff who could have been expected to consult the appropriate public records prior to entering into an arm's length land transaction. This case, by contrast, involves unsophisticated miners who justifiably trusted the fiduciaries who were administering their pension and welfare fund. Plaintiffs could not have been expected to consult public records prior to being given independent cause to suspect the facts on which this suit is based. Finally, the fact that plaintiffs ultimately did learn these facts by going to public records which had been accessible all along does not mean that they should have consulted those records sooner, inasmuch as prior to December 14, 1961, they

had no reason to disbelieve the trustees and the Union, and thus had no reason to search the public records.

V. *The Merits*

Assuming, *arguendo*, that this Court has jurisdiction to decide this case, the question remains whether the defendants would be liable under the facts as proven. I will now address that question, considering the issue of liability under all the asserted grounds except the Section 301 ground, breach of a collective bargaining agreement. The question of Section 301 liability, it would seem, has already been disposed of by the findings, *infra*, in the discussion of jurisdiction, that the trustees incurred no *contractual* obligations as a result of the collective bargaining agreements between the Union and the operators, and that those agreements did not impose on the Union a contractual duty to enforce the operators' responsibility to contribute to the Fund. In view of those findings, there can be no Section 301 liability in this case, inasmuch as Section 301 provides jurisdiction solely for a breach of contract action.

A. *Liability of the Trustees*

Plaintiffs frame the issue with respect to the trustees' liability as follows:

> "The trustees of a section 302 pension fund have the duty to use due diligence to collect payments due and owing to the fund and where, *for the benefit of the union*, they *purposefully* fail to do so, they are liable to the fund for the loss thereby caused it." Volume J, Plaintiffs' Trial Brief of the Law, at 14. (emphasis supplied)

Such activity on the part of the trustees, plaintiffs maintain, is a violation of the trustees' duty under Section 302 to establish the Fund for the "sole and exclusive benefit of the employees," and their common law duty of undivided loyalty to the beneficiaries. Plaintiffs thus equate the questions of the trustees' Section 302 liability and their liability under the common law duty of undivided loyalty. Such an equation would appear to be well-founded,[28] and this Court will accept the issue as framed by the plaintiffs in determining the trustees' liability under Section 302 and the duty of undivided loyalty.

In addition, plaintiffs argue that the trustees' administration of the Fund, regardless of the motive or intent of their activity, amounted to a breach of a trustee's common law "duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust." Restatement, Trusts 2d, § 177 (1959). Thus, whether the trustees are liable depends on whether, under the facts as proven, (1) they purposefully failed to collect delinquent operator royalties in order to benefit the Union (Section 302 and the duty of undivided loyalty), or (2), regardless of the trustees' motive or intent, they failed to take reasonable steps

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[28] At least one other court has noted the similarity of the two duties. In Blankenship v. Boyle, 329 F. Supp. 1089, 1095 (D.D.C. 1971), the court stated:

> "Congress anticipated such differences in enacting § 302(c) of the Labor-Management Relations Act, and sought to temper them by the anticipated neutrality of the third trustee. The congressional scheme was thus designed not to alter, but to reinforce, 'the most fundamental duty owed by the trustees': the duty of undivided loyalty to the beneficiaries. 2 Scott on Trusts § 170 (3d Ed. 1967). This is the duty to which defendant trustees must be held in this case."

See also Restatement, Trusts 2d, § 170(1) (1959), which provides that the "trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."

to enforce the operators' obligations to the Fund (duty to enforce claims).

1. *Section 302 and the Duty of Undivided Loyalty*

Plaintiffs point to one primary fact in support of their contention that the trustees attempted to benefit the Union by purposefully failing to use due diligence to collect delinquencies—the trustees' reluctance to force active miners out of work. Plaintiffs argue that the trustees steadfastly pursued a policy of not taking any action, particularly the initiation of vigorous lawsuits against delinquent operators, which might close down operators and cause workers to lose their jobs, and that they followed this policy in order to further the Union interest of protecting working miners, "despite the readily apparent harmful financial effect which the policy had upon the Fund." Volume J, Plaintiffs' Trial Brief of the Law, at 40. Defendants agree that the trustees were reluctant to force active miners out of work, but dispute the rationale behind the trustees' policy. Defendants maintain that this policy was followed because of the trustees' honest and good faith belief that closing down operators would only harm the Fund, both by lowering the total amount of royalties owed the Fund as a result of the reduced production which closing down operators would inevitably cause (Fund income was directly tied to production), and by adding to the number of Fund beneficiaries by prematurely forcing active miners into pension status. Thus, the critical issue here is the trustees' motive in attempting to administer the Fund and enforce the operators' obligation to contribute without closing down delinquent operators.

It is, of course, impossible to peer into men's minds to ascertain the motives for their actions, and it is rare that people will articulate their motives. The motive of

an act must ordinarily be determined inferentially from the act itself and the circumstances surrounding it. Plaintiffs recognize that this case is no exception to that rule, and offer several arguments in support of their contention that the trustees' motive in this case was improper. They argue first that "the words of the Union officials themselves" evidence "a deliberate, calculated plan" to avoid harming the interests of working miners. Volume Z-6, Plaintiffs' Reply Brief Concerning All Parties' Requests for Findings of Fact and Conclusions of Law, at 15. In addition, they maintain there is evidence of selective enforcement by the trustees of the operators' obligation to contribute to the Fund, and that this failure to enforce the obligation to pay royalties against all companies "was not an accidental or unwitting failure but the result of deliberate plan and purpose." [29] Request No. 219, Volume Z. Requests for Findings of Fact and Conclusions of Law. Finally, they argue that even the few lawsuits that were brought by the trustees against delinquent operators during the 1950s reveal the trustees' unlawful

[29] Plaintiffs are vague about how the allegation of selective enforcement relates to their charge that the Fund was administered so as to benefit the Union. They do not specifically maintain, for example, that the trustees were least insistent with respect to the companies whose financial position was most precarious and who were most in danger of going out of business. They simply allege conclusorily, as indicated in the text, *supra*, that the selective enforcement was "the result of deliberate plan and purpose." So stated, the argument seems to be that, because selective enforcement has bad connotations, smacking as it does of sweetheart deals, kickbacks and the like, the alleged selective enforcement in this case is simply evidence of the defendants' overall bad purpose and design. It should be emphasized at this point, however, that while the trustees do appear to have been less insistent with respect to the obligations of some operators than others, no explanation for this apparently disparate treatment is suggested by the record in this case.

purpose in that the suits were invariably initiated after the operator had already gone out of business and, thus, when there was no risk that the suits themselves would put miners out of work. The facts do not support the plaintiffs' contentions.

Taking the arguments in the order described, there are indeed several statements in the record which reflect the intention of the Fund officials not to close down delinquent operators. *See* Plaintiffs' Requests for Findings of Fact and Conclusions of Law Nos. 220-228. These statements, however, are at best inconclusive on the issue of the motivation behind this policy. While the statements do indicate that it was not the intention of Fund officials "to further contribute to the unemployment problem by forcing companies out of business[,]" they do not reveal the motive behind such a policy. Letter between counsel for the Fund, July 23, 1956, located at Volume D, p. 19. Indeed, one of the statements offered into evidence by the plaintiffs is more supportive of the defendants' position that the policy was followed in order to avoid reducing the Anthracite production level to which Fund royalties were directly tied. This is a January 26, 1962 public statement of trustees Thomas Kennedy and Mart Brennan, which contains the following excerpt:

> "We have had many difficult times in the Anthracite Industry, which have affected royalty payments. In this respect we wish to emphasize that there is one thing that these people who are doing all the shouting seem to forget, and that is *we must also look after the welfare of the men who are employed in the mines, whose daily production of coal makes possible the function of the Anthracite Health and Welfare Fund from royalty payments, which are levied on every ton of anthracite which is produced for use or for sale.*"

Volume D, pp. 24 and 25. (emphasis supplied)

In any event, the statements themselves do not support plaintiffs' position that the policy of avoiding the closing down of delinquent operators was pursued for the purpose of promoting the Union's interest in not harming working miners.

Plaintiffs next argue that the trustees engaged in selective enforcement of the operators' obligation to contribute to the Fund, insisting on the one hand that some operators abide strictly by the terms of the Anthracite Wage Agreements requiring contributions to the Fund, while permitting other companies to build up huge delinquencies without taking any action against them. Plaintiffs conclude that this selective enforcement was "the result of deliberate plan and purpose." Request No. 219, Volume Z, Requests for Findings of Fact and Conclusions of Law. The short answer to this contention is that the evidence on which plaintiffs rely to establish that the defendants engaged in selective enforcement only indicates that some operators complained on selective enforcement, not that the defendants actually and intentionally engaged in such a practice. *See* Plaintiffs' Requests for Findings of Fact and Conclusions of Law Nos. 210-218. More to the point, while the record does indicate that the trustees were less active in pursuing the delinquencies of some operators than of others,[30] no explanation for this apparently disparate treatment is suggested by the evi-

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[30] The trustees were particularly inactive as to the delinquencies of three major producers, Diamond Coal Co., Penag Coal Co., and Steam Coals, Inc. Indeed, the trustees' lack of diligence in pursuing the delinquencies of these three companies amounted to negligence for which they were liable under the common law duty to enforce claims. *See* discussion of duty to enforce claims, infra, for a more detailed analysis of the trustees' actions with respect to these three producers. There is no explanation in the record, however, for this apparently

dence in this case. For example, there is no evidence of any arrangements, sweetheart deals or kickbacks between the trustees and any operators. There is not even an indication that the trustees deliberately decided to treat some operators differently than others. In the absence of any such evidence, I am unwilling to find that the discrepancies in the trustees' treatment of delinquent operators were either intentional, motivated by some improper purpose or beneficial to the Union.

Finally, plaintiffs maintain that the trustees' improper motive is revealed in the timing of the lawsuits which the trustees actually brought against delinquent operators during the 1950s. Plaintiffs argue that most of these suits were initiated against operators who had already gone out of business, thereby evidencing the trustees' refusal to take any action which itself would have forced operators out of business. Even assuming that the trustees usually waited to sue until an operator had gone out of business, however, that does not mean that their reluctance to sue was due to an improper purpose to advance the interests of the Union and the working miners at the expense of the Fund. Such timing of lawsuits would be equally as consistent with the defendants' explanation of the trustees' reluctance to close down delinquent operators as with the plaintiffs' theory. That is, the trustees could have taken the position that they did not want to jeopardize current income to the Fund by forcing companies out of business, but that, once a company did go out of business, they should sue immediately in order to obtain as high a position as possible among the company's creditors. Presumably, however, the fact that a com-

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disparate treatment, and, in the absence of any evidence to the contrary, I am unwilling to find that the discrepancies in the trustees' treatment of delinquent operators were either intentional or motivated by some improper purpose.

pany went out of business would either reduce or eliminate the chance of recovery but, in the absence of any independent evidence of an unlawful purpose behind the trustees' reluctance to put delinquent operators out of business, and I find that there is no such evidence in the record of this case, *see infra*, I decline to infer an unlawul purpose from the timing of some of the lawsuits which were brought against the operators. More fundamentally, though, I find that the facts concerning the timing of lawsuits are not as plaintiffs allege. Although some companies were sued after they had gone out of business, for example, No. 9 Coal Co., the Floss Coal Co., and JAC Coal Co., the majority of suits were instituted against operating companies. And although on the whole these suits were not pursued with vigor by the trustees, *see supra*, their timing at least does not support the plaintiffs' contention of an unlawful purpose on the part of the trustees in their administration of the Fund.

None of the plaintiffs' articulated arguments, therefore, support their overall contention that the trustees administered the Fund with an unlawful purpose to benefit the Union. Looming behind their stated contentions in this case, however, are an assumption concerning the nature of the trustees' activities and an unarticulated argument that this Court should infer a purpose to benefit the Union from the simple fact that throughout the period covered by this suit, two of the three trustees were Union officials; both the assumption and the unarticulated argument must be separately addressed in order to give full consideration to the plaintiffs' position in this case.

The assumption is actually a series of two assumptions: (1) that a policy of vigorous action by the trustees, resulting in the closing down of the most delinquent and weakest operators, would have been

better for the Fund in the long run than the policy of reluctance to close down delinquent operators which was actually followed by the trustees; and (2) that the advantages of a policy of vigorous action and the harmful effects of the policy actually followed were apparent at the time that the latter policy was adopted and followed. I fail to find these assumptions persuasive.

To begin with, it is by no means clear that a policy of vigorous action by the trustees, resulting in the closing down of the most delinquent and weakest operators, would have been better for the Fund in the long run. Several operators who were not immediately sued when they initially became delinquent went on in later years to make up their delinquencies and render substantial contributions to the Fund. This is true even as to some of the 33 companies as to which the plaintiffs maintain the trustees' record was the most delinquent. *See, e.g.*, the record as to the Kehoe-Berge Coal Company, at Vol. G, p. 50, and the Otto Collieries Co., at Vol. H, p. 5. If these companies had been forced out of business at the outset, the Fund would never have received these later contributions. Furthermore, the mere procuring of judgments against delinquent operators would not necessarily have benefited the Fund, as the trustees may very well have been unable to collect on the judgments, as occurred with several of the judgments which were obtained as a result of the lawsuits of the 1960s. Thus, I find that it would be sheer speculation to assume that the policy of vigorous action from the outset advocated now by plaintiffs would have been better for the Fund than the one actually followed.[31]

[31] This is not to say that the trustees were justified in carrying their policy of accommodation to the extremes that they did and in waiting in effect until the mid 1960s to begin taking vigorous action with respect to the delinquent operators. That is a question that must be considered in the context of determining whether the trustees' actions discharged their common law duty to take reasonable steps to enforce the operators' obligations to the Fund. *See infra.* However, the plaintiffs assume that a policy of vigorous action and a no compromise approach *at the outset* would have been preferable to what the trustees actually did, and that the trustees rejected the former and adopted the latter in order to further the Union's interests in protecting working miners at all costs, even the demise of the Fund. That is the assumption which I find unacceptable.

More important from the standpoint of the trustees' motive, moreover, it was by no means clear at the time the trustees made their decisions with respect to the problem of operator delinquencies that their actions would be detrimental to the Fund in the sense that most of the delinquent operators would end up never paying their delinquencies. The trustees could have properly and reasonably concluded that a policy of attempting to keep the royalty payments current and collect as many delinquencies as possible without forcing operators out of business would ultimately redound to the Fund's best interests because it would ensure that current production would be as high as possible. Since the Fund's receipts were directly tied to production, it is understandable how such an approach could have been deemed beneficial to the Fund. Moreover, those tactics would maintain the industry's production capacity at a high enough level to be able to easily accommodate the increased demand which would occur in the event that the Anthracite market recovered. The trustees' approach does reflect an assumption on their part that the industry would recover. In this regard, accomodating what were assumed to be the short-term problems of the operators would have been justifiably viewed as being in the Fund's best interests, inasmuch as the record indicates that the delinquencies problem was most acute during the leanest years and that the operators' contribution record had been good during the

early years of the Fund, before the Anthracite market began its dramatic, post-war plunge. *Cf.* Blankenship v. Boyle, 329 F. Supp. 1089, 1106-1107 (D.D.C. 1971), where, in a case involving the welfare and pension fund of the bituminous coal industry, the court refused to find a breach of trust in the trustees' decision to tolerate large delinquencies by a major coal operator over a long period of time. The court stated, "[d]ifficult judgments had to be made by the Funds' representatives during the period of deficiency, but they were made honestly and the decision temporarily to tolerate substantial non-payment ultimately redounded to the benefit of the Fund." *Id.* at 1107. That the Anthracite industry, unlike the bituminous coal industry, never did recover does not, in the absence of any evidence to the contrary, establish that the trustees acted in disregard of inevitable harm to the Fund in an attempt to further the interests of the Union. Thus, I do not accept the plaintiffs' assumption that the harmful effects of the trustees' policies were apparent at the time that those policies were adopted and followed.

Nor do I agree with the plaintiffs' unarticulated argument that a purpose to benefit the Union at the expense of the Fund should be inferred from the single fact that, throughout the period covered by this suit, two of the three trustees were Union officials. This is in spite of the fact that it seems indisputable that the two Union trustees were placed in a position of potential conflict of interest by the initial Anthracite Wage Agreement which created the Fund and provided that two of the trustees were to be appointed by the Union, and were kept in that position by the succeding Anthracite Agreements which designated who the trustees were to be and invariably designated two Union officers. The potential conflict existed because the interests of the active miners and the pensioners were not

completely harmonious.[32] In this case, the chances of conflict between the Union trustees' concern for active miners on account of their affiliation with the Union and their responsibility for the pensioners by virtue of their position as trustees were perhaps even greater than they might have been in another industry, if only because the Fund was operated on a "pay as you go" basis and the Anthracite industry was in a precarious position throughout the history of the Fund. The industry simply never became healthy enough to simultaneous support all the active miners and all the pensioners.[33]

But the existence of a potential conflict of interest on the part of a trustee does not, *ipso facto*, constitute a breach of trust. To begin with, the law does not automatically penalize a trustee who is placed in a position of conflict of interest by the creator of a trust, as the trustees were here. Flagg Estate, 365 Pa. 82, 88-89 (1950). Under those circumstances, bad faith on the part of the trustee must be affirmatively shown in order for the beneficiary to obtain relief. *Id*; Landis Trust, 382 Pa. 486, 494 (1955). In the context of this case,

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[32] The non-mutuality of the interests of active and retired workers has been recognized by the Supreme Court. *See* Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 173 (1971).

[33] At the same time, the interests of the active and retired miners were not totally antagonistic. Because the active miners expected to be retired themselves some day, it was in their interest to keep the Fund as healthy as possible. And because the Fund was financed by royalties paid on the basis of coal produced, it was in the pensioners' best interests that coal companies stay in business and continue to produce coal. In addition, if coal companies went out of business, the retirees could reasonably expect more pensioners to be added to the Fund's rolls and place an even greater drain on the Fund's limited resources.

the plaintiffs must point to additional evidence, aside from the single fact that two of the trustees were Union officers, to support the inference that the trustees acted with an improper purpose to benefit the Union and in disregard of harm to the beneficiaries in their administration of the Fund. I find no such evidence in this case. There is no evidence here of activity on the part of the trustees that was clearly detrimental to the Fund at the same time that it was beneficial to the Union and that was performed by the trustees in order to benefit the Union, the kind of activity which would support a conclusion that the trustees acted with an improper motive to benefit the Union in their administration of the Fund. In this regard, contrast the record in Blankenship v. Boyle, 329 F. Supp. 1089 (D.D. C. 1971), where the court found a breach of the duty of loyalty in the trustees' permitting large sums of the bituminous coal industry's fund to remain in interest-free accounts at a union-owned and controlled bank. As the record in this case contains no evidence of any similar activity, I conclude that the plaintiffs have not met their burden [34] of establishing that the trustees breached their Section 302 and common law duties of undivided loyalty by purposefully failing to collect delinquent operator royalties in order to benefit the Union.

2. *Duty to Enforce Claims*

Plaintiffs maintain that, regardless of the trustees' motive or intent, they failed to make reasonable efforts to enforce the operators' obligations to the Fund and,

[34] "Those who seek to surcharge a fiduciary for a breach of trust must bear the burden of proving the particulars of his wrongful conduct." Bard's Estate, 339 Pa. 433, 437 (1940). *Accord,* Lerch Estate, 399 Pa. 59, 68 (1960).

thus, violated the common law duty of a trustee "to take reasonable steps to realize on claims which he holds in trust." Restatement, Trusts 2d § 177 (1959). They argue that the trustees' administration of the Fund was deficient both from the standpoint of actions not taken, in the sense that they did not adopt an aggressive enough approach to the delinquency problem, failing, for example, to file any serious lawsuits against delinquent operators until the federal suits of the 1960s, as well as from the standpoint of action taken, in the sense that the trustees did not even pursue the policy which they did adopt with sufficient diligence to discharge their duty to take reasonable steps to enforce the claims against the delinquent operators. In essence, plaintiffs' claim is that the trustees were negligent in their administration of the Fund. Defendants in turn reply that the trustees' actions were sufficient under the circumstances to fulfill their fiduciary obligations.

At the outset, inasmuch as the sole jurisdictional basis for federal consideration of this claim would be the doctrine of pendent jurisdiction, it is recognized that state substantive law, in this instance the law of Pennsylvania, controls. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). With respect to an allegation of negligent administration by a trustee, Pennsylvania law is clear that the plaintiffs bear the burden of proof. Lerch Estate, 399 Pa. 59, 68 (1960). And with respect to the general standard of care required of a trustee, the Pennsylvania courts have consistently held that ". . . all that is required of a trustee 'is common skill, common prudence and common caution, and he is not liable when he acts in good faith as others [prudent men] do with their own property . . .' ." *Id.* at 64, quoting Mereto Estate, 373 Pa. 466, 468 (1953), which in turn was quoting Stirling's Estate, 342 Pa. 497, 504 (1941). More specifically, regarding

an allegation of negligent failure to enforce claims which the trustee holds in trust, Pennsylvania law would seem to be in agreement with the Restatement, Trusts 2d § 177 that the trustee is "under a duty to the beneficiary to take reasonable steps to realize" on such claims. *Id. See* Hartje's Estate, 320 Pa. 76 (1935). *See also* Jacob's Trust Estate, 320 Pa. 539 (1936). Thus, the applicable standard is one of reasonableness, and the critical question is whether, under the circumstances which prevailed throughout the period of their stewardship, the trustees exercised that degree of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property in their handling of the problem of operator delinquencies. With that question in mind, I now turn to an analysis of plaintiffs' claim and the facts of this case.

Plaintiffs concentrate their attack on the trustees' administration during the years prior to 1962, and claim that it was particularly during those years that the trustees' actions were deficient. In support of their argument, they maintain that the record in this case discloses a course of action by the trustees with respect to operator delinquencies that was woefully inadequate given the scope and magnitude of the problem. In view of that allegation, a close examination of the record of the trustees' approach is in order.

The most obvious fact concerning the trustees' approach during the 1950s is that they relied principally on the Union in their attempts to keep the operators current. In this regard, a notice of delinquency was sent each month to each Union district president, notifying him of the amount of each operator's outstanding delinquency. This form contained a space for the district president's recommendation with regard to the delinquency. Although this practice was routinely followed throughout the 1950s, the record reflects little, if any, success as a result of the sending of these notices.[35] The notices appear to have generated little more than routine and repetitious phone calls and letters by some of the district presidents and other local Union officials to the delinquent owners in their districts, which, judging from their results, fell onto deaf ears and into unresponsive hands. *See e.g.*, the record as to Morea Mining Company, Inc., contained in Defendants' Requests for Findings of Fact Nos. 767-769 and 771-773.

The other manner in which the trustees directly made use of the Union in their attempts to deal with the problem of delinquencies was the staging of strikes against some of the delinquent operators in an attempt to force them to pay royalties. Although there are isolated examples in the record of occasions when a strike achieved the desired results, usually in the form of an agreement by the operator to remain current in its royalty payments and to make installment payments on

[35] It should be emphasized at this point that the test in evaluating the adequacy of the trustees' handling of operator delinquencies is not the success *per se* of their efforts to collect the arrearages and force the companies to remain current, but the nature and diligence of their efforts in view of all the circumstances. The key question is whether their attempts to solve the problem of operator delinquencies were such that prudent men could be expected to have made in handling their own property. They should not be penalized if, in spite of reasonable efforts to collect the arrearages and keep the operators current, they were ultimately unsuccessful because of circumstances beyond their control. At the same time, however, the success of any particular actions on their part, or of their overall approach to the problem in general, does bear indirectly on the question of the sufficiency of their administration of the Fund. If they persisted in certain tactics after they had proved to be unsuccessful, without altering their tactics when reasonably prudent men handling their own property would have changed their approach, they can be given no credit for such persistence.

its delinquency, followed by adherence to the agreement by the operator, *see, e.g.*, the record as to Fisher Associates, Inc., Volume F, pp. 186-221, and the record as to the Mary D Mining Co., Volume G, pp. 102-123, the strikes were usually ineffective in exacting stricter observance by the operators of their obligation to pay royalties. More important from the standpoint of an evaluation of the sufficiency of the trustees' actions, however, the strikes were relatively few in number, considering the magnitude of the delinquency problem, and were staged sporadically and inconsistently, some of the most delinquent operators never having been struck. *See, e.g.*, the record as to Mountain Top Coal Co., Volume G, pp. 187-201, No. 9 Coal Co., Volume H, pp. 1-4, and the Sheila Coal Corp., Volume H, pp. 188-195.[36]

The record also reflects numerous letters and telephone calls from the trustees themselves to delinquent operators. Like the letters and phone calls generated by the notices of delinquency program, however, these informal efforts by the trustees to bring the operators into line were of little effect and cannot be given much weight in evaluating the adequacy of the trustees' actions.

Nor can the lawsuits filed by the trustees against delinquent operators during the 1950s be given much weight in determining the sufficiency of their actions. As has already been noted, *supra*, in the discussion of the general factual background of this case, these suits were not prosecuted with any vigor, most of them not having been pursued beyond the complaint stage. Not

[36] This does not even include the three most flagrantly delinquent companies, Diamond Coal Co., Penag Coal Co., and Steam Coals, Inc., which were never struck. The record as to these companies is discussed separately, *infra*.

surprisingly, they were largely ineffectual in recovering outstanding delinquencies.

The most important trustee activity during the 1950s, from the standpoint of evaluating the sufficiency of the trustees' actions during that time, were the formal agreements which were negotiated with several of the delinquent operators. This is because these agreements epitomized the trustees' general approach to the problem of operator delinquencies during the 1950s—a purported policy of flexibility and tolerance rather than rigidity and insistence in the face of both large past delinquencies as well as wholesale failures to pay currently by many operators, of attempting to make the best of a bad situation by obtaining operator agreements to pay currently instead of running the risk of exacerbating the situation by forcing large numbers of operators out of business by suing for past delinquencies. When regarded in this light, the most relevant facet of the 1950s agreements is how few in number they were in view of the large number of delinquent companies at the time. Although the number of delinquent operating companies during the years 1954-1962 ranged from a low of 33 in 1954 and 1959 to a high of 61 in 1955, the total number of operator agreements during the 1950s was 20.[37] More significantly, of the 33 companies on which plaintiffs concentrate their case, agreements were made with only 13.[38]

[37] This does not even take into account the large number of delinquent non-operating companies during this time. *See* the chart at Appendix A to this opinion. When these companies are placed into the balance the trustees' efforts during the 1950s become even less significant.

[38] All of these agreements contained an acknowledgement by the operator of most or all of its past delinquncy, a promise to make regular installment payments on the delinquency, and a promise to remain current in future payments to the

Moreover, not only were the agreements ultimately unsuccessful in bringing significant amounts of royalty payments into the Fund, many of them were immediately unsuccessful in the sense that the operators violated them shortly after executing them, either by failing to pay currently, or failing to pay the agreed-upon installments on delinquencies, or both. *See, e.g.*, the record as to Coates Coal Co., Volume F, p. 11 and Plaintiffs Response to Defendants' Request for Findings of Fact No. 433; Cyclone Coal Co., Defendants' Request for Findings of Fact No. 456; and Duryea Coal Co., Plaintiffs' Response to Defendants' Request for Findings of Fact No. 503.

In sum, then, the record contains the following ac-

Fund. The 13 companies with which agreements were made and the dates of the agreements are as follows: Coates Coal Co., 12-1-58 (Volume F, pp. 12-16); Cyclone Coal Co., 12-53 (Volume F, p. 41); Duryea Anthracite Company, 4-11-53 (Volume F, pp. 154-162) (on 8-8-51, Duryea executed a less formal and less comprehensive agreement to pay currently to the Fund and to make some payments on delinquencies, without admitting the total amount of delinquencies accrued. *See* Volume F, p. 145); Fisher Coal Co., 12-15-56 (Volume G, p. 7); Fisher Associates, Inc., 10-56 (Volume F, pp. 201-217); JAC Coal Company, 12-53 (Volume G, p. 45); Kohinoor Coal Company, 4-12-55 (Volume G. pp. 84-87); Mary D. Mining Company, 12-30-54 (Volume G., pp. 109-118); Meadowside Coal Company, two agreements, 5-25-51 and 11-25-52 (Volume G, p. 126 and Defendants' Exhibit 17, p. 503); Moosic Mountain Coal Company, 8-2-51 (Volume G, p. 167); Newkirk Mining Co., Inc., 12-31-57 (Volume G, p. 205); Pioneer City Coal Company, 8-3-51 (Volume H, p. 116); and St. Clair Coal Co., 9-22-55 (Defendants' Exhibit 26, pp. 63-66). The trustees also executed agreements with the following companies: Conlon Coal Co., 8-1-51 (Defendants' Exhibit 17, p. 126); Jackson Coal Co., 12-57 (Defendants' Exhibit 26, pp. 116-117); Motley Coal Co., 8-8-51 (Exhibit 17, p. 183); Rhonda Coal Co., 8-21-51 (Exhibit 17, p. 203); Stevens Coal Co., 10-56 (Exhibit 26, p. 81); and Valley View Coal Co., 8-6-56 (Exhibit 26, pp. 76-80).

tions by the trustees with respect to the problem of operator delinquencies during the 1950s: routine sending notices of delinquency to local Union officials; isolated and sporadic strikes against delinquent companies; numerous letters and telephone calls to owners; a handful of *pro forma* lawsuits; and some negotiated agreements which failed to bring any significant sums into the Fund. This record would seem to support the plaintiffs contention that the trustees' approach to the problem of operator delinquencies during that decade was inadequate. Defendants, however, maintain that the problems confronting the trustees during those years were unusually complex and numerous, and that the approach actually taken to the problem of operator delinquencies, if not without question the best approach from the vantage of hindsight, was at least sufficient, under the unusual and difficult circumstances that prevailed at the time, to discharge their duty to take reasonable steps to enforce the operators' obligations to the Fund. This contention requires a close look at the circumstances surrounding the Fund during the 1950s.

It cannot be disputed that the trustees were indeed faced with an unusually complex and trying set of circumstances during that period of time. To begin with, the market for Anthracite diminished drastically during the 1950s, total production declining precipitously during every year of the decade but 1956, when the market made a slight and short-lived recovery. This reduction in demand for Anthracite was caused primarily by competition from the natural gas and heating oil industries, as those fuels replaced coal as the primary sources of domestic heating fuels in this country. *See* the testimony of Doctor George H. K. Schenck, an expert in mineral economics, at p. 345 of the trial transcript of this case.

At the same time that total production was declining

as a result of competition from other industries, the Anthracite industry was being ravaged by intense competition within itself, as the existing companies sought to retain as much as possible of a rapidly shrinking market. The most obvious sign of this intra-industry competition was a steady drop in market price of Anthracite during the 1950s. *Id.* pp. 347-350. The most significant result of this competition, from the standpoint of the Fund at least, was the low profit margin which the operators maintained, as the companies sold their coal at or near cost in order to retain as much of the market as possible. *Id.* p. 350. This meant that any non-production expenditure, such as the royalty payments to the Fund, the rate of which, incidentally, increased steadily during the decade, became more difficult to make under normal circumstances, and close to impossible to make in the event of unforeseen circumstances, such as disasters or sudden and dramatic drops in the market.

Such unforeseen circumstances occurred regularly during the 1950s. The precipitous decline of the Anthracite market during those years has already been mentioned. Disasters seemed to hit the coal companies almost as frequently as market declines. The record is replete with examples of fires, floods and cave-ins which decimated some of the companies. *See e.g.*, the record as to the Duryea Coal Co., Volume F, pp. 146-147; and Peca Coal Co., Inc., Volume H. p. 17.

As a result of these conditions, many operators ceased making royalty payments altogether, or made them only irregularly, as all costs were trimmed to the bone in an attempt to weather what was viewed as a passing market depression and temporary bad times; these operators were quick to plead their hard times as excuses for their failure to make payments to the Fund, and to promise full payment just as soon as the

good times returned. Many of the proffered excuses seem to have been made in good faith by the operators in question. *See, e.g.*, the record as to Meadowside Coal Co., Volume H, pp. 126 and 129. At the same time, several of the delinquent operators offered more specious explanations for their continued non-payment. *See, e.g.*, the record as to Moosic Mountain Coal Co., Volume G, p. 161 (current owner of the operation, a corporation, disclaimed all liability for payments owed the Fund by previous owners, which had been a partnership); and Jeddo-Highland Coal Co., Volume C, p. 37 (president of company charged the trustees with selective enforcement obligations to the Fund, and stated that his company would only resume current payments when substantially all other operators were making their payments).

The variety of excuses offered by the operators suggests another factor which complicated the situation faced by the trustees and which lends support to defendants' contention that the problem of delinquencies was too complex and multi-faceted to be solved by a simple, uniform approach. The trustees were dealing with over 100 different owners, each of whom seemed to have unique problems and a different attitude concerning his obligation to the Fund. Some owners, for example, took their obligation to the Fund seriously and made good faith efforts to maintain their royalty payments and pay off their delinquencies. *See, e.g.*, the record as to Kehoe-Berge Coal Co., Volume G, pp. 50-79. During the early 1950s, when Kehoe-Berge accumulated some delinquencies, the company kept the trustees informed of its difficulties and vowed to pay its debt to the Fund as soon as possible. *Id.* pp. 52-54. The company paid currently during the years 1952-1959, and made some payments on its delinquency during those years. *Id.* n. 50. Finally, the company even

made a payment on its delinquency five years after it had ceased to operate. *Id.* pp. 72-76. Other owners, by contrast, practically ignored their obligations to the Fund, and openly defied the trustees' efforts to force them to make royalty payments. *See, e.g.*, the record as to Diamond Coal Company, Penag Coal Company, and Steam Coals, Inc., which are discussed in greater detail, *infra.*

Another factor which the defendants point to both as an example of the complexity of the situation confronting the trustees as well as an explanation for the trustees' failure to stage more frequent and more effective strikes against delinquent operators is the resistance from working miners which was encountered whenever strikes were attempted. *See, e.g.*, the record as to the Hammond Coal Company, Defendants' Exhibit 3, Deposition of John Eagan, pp. 33-34 (the Union attempted to close down the company for violations of the contract, but was met by working miners and "pretty nearly stoned off the property.") *See also* the record as to Penag Coal Company and Steam Coals, Inc., *id.* pp. 26-32, which indicates that the Union encountered particularly strong resistance from the miners in these two companies, both because the miners were tightly controlled by the owner who was particularly hostile in his refusal to fulfill his obligations to the Fund, as well as because those companies were surrounded by non-union operations, and the men feared that if they struck, the non-union companies would absorb their production and cause them to lose their jobs permanently.

A final complicating factor relied on by the defendants here is the fact that several companies did not become signatories to the Anthracite Wage Agreement until sometime after the Fund's records indicated their obligation to the Fund had begun to accrue. *See, e.g.*,

the record as to Landingville Coal Company, Defendants' Request for Findings of Fact Nos. 660 and 661; JAC Coal Company, *id.* Nos. 607 and 608; and Diamond Coal Company, Volume F, p. 65. The defendants rely on this fact both in support of their contention that the trustees faced an almost insurmountable problem because of the complexity of the situation (several of the companies were advancing the argument that they were not obligated to the Fund in the amount claimed by the trustees because they had not been signatories to the contract at one time or another; this was regarded by the trustees as an impediment to lawsuits against delinquent operators. *See* Volume D, p. 23), and in mitigation of any damages that might be assessed against the defendants as a result of this lawsuit.

The record supports defendants' contention that the trustees were faced with unusually complex and difficult circumstances in their administration of the Fund during the 1950s. The record also supports the conclusion that the trustees consciously adopted a tolerant approach to the problem of operator delinquencies in light of what they regarded as an extremely complicated situation. A July 23, 1956 letter between the Fund's two attorneys contains the following passage:

> "In all fairness, when one considers the entire picture of the Health and Welfare payments and the various assortment of business associations, viz. individuals, partnerships, corporations, etc., I believe it is very hard to draw a hard and fast rule that would be applicable to all concerned. It is very easy to say that all outfits should pay 'on the nose' and let it go at that. However, common sense dictates that every coal outfit has its own particular problems and, of necessity, the man-

agement of each demands quite a bit of overhead. I can appreciate the fact that problems are varied. Therefore, I certainly would endorse the approach of the Trustees in that they were desirous of primarily having the payments made current, giving time to each particular company to pay arrearages and to liquidate any indebtedness that might have been incurred in order to make any downpayment on the arrearages at the time of any agreement."

Volume D, p. 23. Another letter from the Fund's attorney during the 1950s contains the following excerpt:

"The whole problem has been most difficult. The delinquent operators in most instances were in such circumstances that they were unable to operate and make their contributions to the Fund. To permit them to operate without making their contributions would be unfair to the paying operators. Action which resulted in the closing of operations could only worsen a bad situation."

See letter attached to document No. 177, p. 2.

Furthermore, I find that the trustees' policies were adopted in good faith. No evidence to the contrary has been presented by the plaintiffs, *see* discussion under Section 302 and the Duty of Undivided Loyalty, *supra*; and the adoption of those policies in the first instance cannot be construed to be an unreasonable response to the actual situation which prevailed.

The question remains whether the actual carrying out of the policies with respect to arrearages amounted to that degree of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property. Defendants maintain that the trustees' approach meets

this standard, emphasizing that there were valid reasons for not instituting vigorous lawsuits any sooner than the mid-1960s. The primary reason for not suing has already been mentioned, *supra*—the trustees were reluctant to take any action, particularly the prosecution of vigorous lawsuits, which would have had the effect of closing down operators, thereby lowering the total amount of royalties owed the Fund, inasmuch as Fund income was directly tied to production, and adding to the total number of Fund beneficiaries by prematurely forcing active miners out of work.[39] The de-

[39] Plaintiffs dispute the logic of these conclusions. They maintain that a policy of forcing the non-contributing operators out of business would neither have decreased overall production nor have added pensioners to the Fund's rolls. Their theory is that the non-contributing companies were mostly marginal and inefficient producers, and that forcing them out of business would have had the beneficial effect of shifting business to more efficient and more profitable operations. According to this theory, total production would have remained constant, while total contributions to the Fund would have increased because the surviving operators would have been the most efficient and most profitable companies which could have afforded to make their payments to the Fund. See Plaintiffs' Response to Defendants' Request for Findings of Fact No. 419. Defendants disagree that other operators would have picked up the slack when delinquent companies went out of business, inasmuch as the market was plagued by declining demand throughout the 1950s. Furthermore, they point out, plaintiffs' assumption that production would have been picked up by signatory companies obligated to contribute to the Fund is unfounded. Defendants maintain that it is just as likely that the slack would have been picked up by non-Union concerns, particularly in District 9, where there were a large number of competing non-Union companies. Non-Union companies, of course, would not have been obligated to contribute to the Fund. There is insufficient evidence in the record to determine which position is correct. With respect to the general issue of lawsuits by the trustees, however, all the parties seem to have overlooked consideration of an approach that would have avoided forcing operators out

fendants also cite other elements which they claim properly motivated the trustees not to sue: "consideration of the Fund's dire need for current revenues to pay pensions, the possible adverse effect of bringing suit at a time when the Fund did not conform with the requirements of Section 302 of the Labor Management Relations Act, and an interest in not expending substantial amounts of the Fund's limited assets on collection efforts which had little hope for recovery." Brief of Defendant United Mine Workers in Support of Requests for Findings of Fact and Conclusions of Law (Document No. 182), pp. 30-31. Finally, defendants point to additional characteristics of the trustees' approach which purportedly rendered it reasonable under the circumstances. They concentrated on maintaining the operators' current payments to the Fund, taking the position that it was preferable to focus on a source of future income to the Fund than to run the risk jeopardizing that future income by too forcefully pursuing

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of work, and yet would certainly have been more effective in the long run than the no-sue policy that was actually followed by the trustees. This is the policy of promptly suing delinquent operators and obtaining judgments against them, but then not attempting to execute on the judgments immediately, instead using them as leverage in endeavoring to secure effective agreements by the operators to pay on arrearages and maintain their current payments. Even if such a tactic would not have been more successful in obtaining effective agreements than the jawboning approach actually followed, it still would have placed the Fund higher on the list of the operators' creditors than the federal lawsuits of the 1960s did when most of the operators went out of business during the 1960s, and therefore would undoubtedly have resulted in a larger recovery by the Fund than the approach actually followed by the trustees. Whether the failure to employ such tactics, or at least tactics different from the ones actually followed, amounted to negligence is considered *infra*.

past delinquencies.[40] And they allegedly focused their efforts on the major producers. *See* Defendants' Requests for Findings of Fact Nos. 416-419.[41]

I would be inclined to accept the defendants' argument that the trustees' actions with regard to delinquencies withstand the test of reasonableness if the record indicated that the trustees pursued diligently the policies which they did adopt, and if it showed that

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[40] This is not just a present explanation of past events, as it is clear that the trustees themselves articulated such a preference. The strongest evidence of this is contained in a mid-1950s letter from the Fund's attorney:

> "The Trustees adopted a firm policy on current payments. The results have been excellent. In almost all of the cases the operator has remained current since his settlement with the Trustees. This has been the chief aim of the Trustees.
>
> "The delinquencies presented a different problem. Each situation had its own peculiar facts. These were weighed and the best possible terms for payment of the delinquencies were ararnged. The amounts were not compromised, but terms for payment were given. In some cases where a substantial down payment was received, the operator was given a period of time, which varied from a year to two years, during which the Trustees agreed not to press for further reductions of the delinquency, providing current payments were made. The theory behind this was that in order to make the down payment the operator had to obtain financing and needed time for repayment. In other cases where little or no down payments were received, monthly payments in reduction of the delinquencies were arranged."

See letter attached to Document No. 177, p. 2.

[41] This conclusion finds little support in the record. For example, the trustees' efforts with respect to three of the largest producers, Diamond Coal Company, Penag Coal Company and Steam Coals, Inc. were minimal. Moreover, there is no evidence in the record that the trustees ever articulated a policy of concentrating on major producers, at least not prior to 1960s.

they abandoned their tolerant approach sooner than the mid-1960s when the federal suits were filed. The adoption and initial pursuit of that approach was a reasonable response to a complex and difficult situation. However, I find that the trustees failed to pursue the delinquencies, even within the framework which they adopted, with sufficient diligence to achieve that degree of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property. Moreover, I find that under the circumstances it was unreasonable for the trustees to persist in their tolerant approach for as long as they did.

The overall statistical inadequacy of the trustees' actions during the 1950s has already been mentioned, *supra*. To repeat the most significant statistic, the trustees secured formal agreements from only 19 of more than 50 delinquent operating companies and from only 13 of the 33 operators on which plaintiffs concentrate their case. This is in spite of the fact that the securing of such agreements was the epitome of the trustees' flexible approach. There is no explanation in the record for the failure to obtain agreements with more operators. For example, there is no evidence of unsuccessful attempts to secure agreements.

Moreover, a close examination of the record as to the 33 companies on which plaintiffs focus their case reveals a lack of diligence that bolsters the conclusion of inadequate action suggested by the statistics. Although there are instances in the record of prompt action by the trustees resulting in substantial compliance with the Agreement by the operator involved,[42] more com-

[42] *See, e.g.*, the record as to Mary D Coal Company, Volume G, pp. 102-123 and Defendants' Request for Findings of Fact Nos. 680-698. Because the Union closed the company down

mon are the instances of almost complete lack of action by the trustees with respect to companies which were not fulfilling their obligations to the Fund, or failure to follow up on action that was taken concerning such companies.[43] The most glaring example of the

in December, 1953, the company paid $2,000 on account and promised to meet current payments. When the company began accruing delinquencies again in 1954, the trustees filed suit on November 22 of that year, following which a formal agreement in settlement of the suit was executed. The company adhered to the terms of the agreement, paying currently from 1955 through 1957 and making substantial payments on its past delinquency during those years and also in 1958, after it had gone out of business. Finally, in 1957, the trustees obtained personal judgments against each of the company's owners. The record as to Mary D is a good example of prompt and persistent action by the trustees which resulted in the payment of substantial sums into the Fund.

[43] *See, e.g.*, the record as to Fisher Coal Company, Volume G, pp. 1-8 and Defendants' Requests for Findings of Fact Nos. 549-557 (although the company was delinquent every year from 1951 through 1956, the record contains no evidence of any action concerning Fisher until December 14, 1956, when the attorney for the Fund met with the company's owner and attorney; the record discloses no additional trustee activity with respect to Fisher, even though the company continued to amass delinquencies through 1960); Hammond Coal Company, Volume G, pp. 14-17 and Defendants' Requests for Findings of Fact Nos. 570-579 (although Hammond accumulated large yearly delinquencies from 1946 through 1954, the record contains no action regarding the company prior to December 29, 1953, when Trustee Kennedy was informed that the company's arrearages had been taken up with the owner; the record reveals little additional activity with respect to Hammond and no activity of any significance, e.g., no attempts to secure a formal agreement); Coates Coal Company, Plaintiffs Response to Defendants' Requests for Findings of Fact No. 445 (although the trustees secured a formal agreement with Coates in 1958, they took no action following the company's default on its agreement in January, 1961 until June 28, 1962, when they entered judgment against the company in accordance with the agreement; they then waited

trustees' lack of diligence, however, is the record as to three of the largest and most constantly delinquent operators, Diamond Coal Company, Penag Coal Company and Steam Coals, Inc. That record reveals almost complete inertia by the trustees in the face of what amounted to open defiance of the companies' obligations to the Fund.

Diamond, for example, amassed large [44] delinquencies in every year from 1956 through 1962.[45] In spite of this record, no significant action as to Diamond was even attempted by the trustees prior to October 15, 1962, when Union representatives attempted to secure a formal agreement from this company. That attempt was unsuccessful. Only when all shipments of Union coal to Diamond for processing were stopped in December, 1962 did Diamond finally agree to pay on its current production. No agreement concerning past delinquencies, however, was ever secured. Notwithstanding this, suit was not filed against the company until

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more than a year, until November 21, 1963, to take any action in execution on the judgment); and Hydrotated Anthracite Fuels Company, Inc., Volume G, pp. 20-43 (although company was sued on November 22, 1954 to recover a delinquency of over $148,000, and although unsuccessful settlement conferences were held up until August, 1956, a default judgment was not entered until January 21, 1957, and a writ of execution was not issued until April 3, 1957, a month after the company went out of business).

[44] $133,962.70 in 1956, $83,300.41 in 1957, $65,037.65 in 1958, $58,531.88 in 1959, $65,346.89 in 1960, $67,527.50 in 1961, and $72,698.56 in 1962. The record as to Diamond is contained in Volume F, pp. 55-140.

[45] This does not include $687,992.70 in delinquencies accumulated prior to 1956; for which the company disclaimed total liability, taking the position that it did not become obligated to contribute to the Fund until it became a signatory to the Agreement in 1956.

July 11, 1966, and no additional action was taken until October 6, 1969, when a default judgment was entered against the company. Diamond's overall contribution record reflects its indifference to its obligations to the Fund and the failure of the trustees to take any effective action against the company. During 18 years of operation, the company paid only $62,918.76 into the Fund, while amassing a total delinquency of $1,102,-671.65.

The record as to Penag and Steam Coals is similarly bad. Penag accumulated large delinquencies every year from 1946 through 1963, and made no payments whatsoever during the years 1946-1955. In addition, the company reported no tonnage to the Fund prior to 1958, and refused to report tonnage during the years 1960-1962. In spite of these continued violations of the Agreement, the record reflects no action whatsoever by the trustees with respect to Penag until April 5, 1957, when the attorney for the Fund reported that an agreement had been reached with the company which provided that it would make a small down payment on arrearages and remain current in its future payments. *See* Defendants' Requests for Findings of Fact No. 873. For the entire record as to Penag, *see* Volume H, pp. 40-112, and Defendants' Requests for Findings of Fact Nos. 871-916. Thereafter, in spite of continuing violations by Penag, the trustees took no additional action of any significance until March of 1963, when they secured a formal letter agreement from Penag. The company, however, immediately ignored that agreement, and continued to amass delinquencies throughout the rest of 1963. In addition, in March, 1964, the company denied Lybrand, Ross Brothers & Montgomery access to their files when that accounting company sought to perform an audit of the tonnage that had been reported to the Fund in the past. In spite of this

contempt for both the Anthracite Wage Agreement and the letter agreement, the trustees did nothing but write complaining letters to the owners until July 15, 1966, when suit was filed in federal court in the Middle District of Pennsylvania. Judgment by stipulation was ultimately entered against Penag in this case on September 26, 1969. The overall contribution record of Penag is $347,632.25 paid into the Fund, and a delinquency of $712,280.61.

The record as to Steam Coals, Inc. is almost identical to that of Penag.[46] For the record as to Steam Coals, *see* Volume H, pp. 196-269 and Defendants' Requests for Findings of Fact Nos. 994-996 and 998-1054. The company built up large annual delinquencies from 1946-1956 and from 1958-1963. During the period 1951-1955, Steam Coals made no payments to the Fund, and filed no tonnage reports with the trustees. In spite of these facts, no action was taken by the trustees prior to April 9, 1956, when the attorney for the Fund reported that an agreement had been worked out with the company. Thereafter, following continued delinquencies, the company was closed down between July 25 and August 13, following which, the company did make current payments for over a year. Steam Coals became delinquent again the next year, however, and the trustees failed to do anything significant about it until March of 1963, when the company signed a letter

[46] This is not surprising, in that both companies had the same manager, H. Wilson Lark, and later, Frederick Lark. Defendants offer this fact in mitigation of the trustees' record as to both companies, arguing that the Lark's defiant attitude made it especially difficult to force the company to comply to the Agreement. *See, e.g.*, Defendants' Request for Finding of Fact No. 1009. The Larks' recalcitrance, however, does not excuse the trustees' failure to make even a reasonable effort to force these companies to comply with their obligations to the Fund.

agreement. That agreement was violated almost immediately and the following March, the company denied Lybrand, Ross access to their files. In spite of this defiance, the trustees did almost nothing until June 27, 1966, when suit was filed in federal court in the Middle District of Pennsylvania. Like the suit against Penag, this suit ended more than three years later when judgment by stipulation was entered against the company. The record does not indicate whether any collection was made on the judgment. Steam Coals' overall contribution record shows $240,968.96 paid into the Fund and a total delinquency of $836,977.14.

Thus, the record discloses a lack of diligence on the part of the trustees in pursuing the problem of operator delinquencies that is unexcused by the explanations, offered by the defendants. The primary explanation, i.e., the complexity and difficulty of the situation, may justify the nature of the original position taken by the trustees, viz., a reluctance to sue or take other extreme action that would have forced operators out of business, but it does not excuse the trustees' lack of diligence in taking other reasonable steps to enforce collection. The trustees should have been more prompt and persistent in pursuing the delinquent operators.[47]

Even assuming, however, that the trustees were

[47] *See* note 42, *supra*, for an example of the kind of result that can reasonably be expected to have occurred if the trustees had been more diligent. In this regard, it is apparent from a close examination of the record that the attitude of the operators was that their obligation to pay royalties to the Fund came last on their list of operating expenditures. *See, e.g.*, the record as to Scutta Coal Company, Inc., Defendants' Requests for Findings of Fact No. 970, in which the company offered as one of its excuses for not making its royalty payments the large amount of rent it was obligated to pay its lessor. A more persistent approach may have caused many of the companies at least to elevate their duty to pay royalties to a higher position on their list of priorities.

justified in adopting a tolerant approach initially and had, from the outset, purseud that approach diligently, I find that it was unreasonable for them to persist in such an accommodating approach for as long as they did, waiting until the mid-1960s, when they filed federal suits against many of the delinquent operators, to change their tactics. As has already been pointed out, *supra*, most of the few formal agreements which were made with delinquent operators during the 1950s were breached shortly after they were executed. Nevertheless, the trustees failed to alter their approach and even resorted to formal agreements once again in the early 1960s, when the letter agreements were negotiated with the help of Union pressure.[48] Moreover, the trustees engaged in little activity during the period 1958-1962, apparently choosing to rely on the unsuccessful agreements which had been made prior to 1958. Under the circumstances, I find that the trustees were negligent in not recognizing the futility of their approach any sooner than they did and in not altering their tactics prior to 1964.[49]

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[48] These letter agreements, while initially more successful than the 1950s' agreements had been, still resulted in breaches by the operators soon after they were executed, ultimately necessitating the filing of the federal suits, beginning in 1964.

[49] An indicator of how fallacious it was for the trustees not to sue sooner than they did is the small amount that was eventually recovered as a result of the federal lawsuits. Of the total of $7,347,931.31 that was claimed in those suits, only $1,535,160.22 has been actually recovered, the balance being owed to the Fund in the form of settlements and judgments. These setlements and judgments, however, appear to be worthless, as the companies involved have no assets with which to satisfy them. It is reasonable to conclude that if the trustees had acted sooner in filing vigorous lawsuits, the actual recovery would have been greater, as settlements and judgments could have been obtained before several of the companies actually ceased operating.

Summing up, therefore, in not pursuing the problem of operator delinquencies more diligently than they did during the 1950s and in persisting in their no-sue approach for as long as they did, the trustees failed to exercise that degree of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property. In so doing, they violated their "duty to the beneficiary to take reasonable steps to realize" on claims held in trust. Restatement, Trusts 2d § 177 (1959). The question remains whether any of the presently serving trustees, or any of the past trustees who are still living, may be assessed damages as a result of this violation. It would appear that they may not. The general rule is that a "trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee." Restatement, Trusts 2d § 223 (1959). Pennsylvania follows the general rule. *See* Bell's Estate No. 2, 226 Pa. 535 (1910). None of the trustees who served during the critical period, the 1950s, are still living. Indeed, no trustee who served prior to 1963 is alive today. Emmett Thomas, who began his tenure in 1963 and is a defendant in this lawsuit, is still alive. Yet he may not be charged with the negligence of his predecessor trustees. Furthermore, I find that Thomas himself was not guilty of any negligence, inasmuch as it would be unreasonable to ascribe the lack of diligence of the 1950s and the persistence in the no-sue policy to a trustee who only began serving in 1963, one year before the trustees changed their tactics with the filing of the federal lawsuits. Thus, although it is the finding of this Court that past trustees violated their fiduciary duty to the Fund's beneficiaries to make reasonable efforts to enforce the operators' obligation to the Fund, none of the trustee defendants in this lawsuit may be held liable for the

violation by their predecessors.

B. *Liability of the Union*

Plaintiffs argue that the "Union, through its domination and control of the Trustees, caused the Trustees to operate the Fund for the Union's benefit." Volume J, Plaintiffs' Trial Brief of the Law, pp. 45-46. They contend that the Fund was operated "in conformity with Union policy against taking any action which might cause operators to close down, putting working miners out of work[,]" and that this policy was detrimental to the Fund because it "precluded the Trustees from making reasonable efforts to collect delinquent royalties." *Id.* p. 46. As a result, they maintain, the Union is liable on any or all of the following grounds: (1) breach of its duty of fair representation; (2) breach of its fiduciary obligations to carry out the provisions of the agreement; and (3) violation of Section 302. These grounds will be addressed *seriatim*.

1. *Duty of Fair Representation*

In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court described the standard to which a union is held by the duty of fair representation. "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.*, at 177. *See also* Humphrey v. Moore, 375 U.S. 335, 342 (1964). A union breaches its duty of fair representation when it arbitrarily and without good reason discriminates against the interest of one group it represents in order to benefit another group. The hallmark of such a breach

is bad faith. Vaca v. Sipes, *supra*, at 193-195.[50]

In support of their contention that the Union has breached its duty of fair representation with respect to the pensioned Anthracite miners, plaintiffs maintain that the facts of this case establish (a) that "the Union has caused the Trustees to fail to collect royalty payments owing and due to the Fund in order to protect working miners"; and (b) that "the Union actively concealed from its pensioner members Union policy with respect to the collection of royalties and caused the Trustees to conceal policies followed by the Fund with respect to delinquent operators and the financial status of the Fund." Volume J, Plaintiffs' Trial Brief of the Law, pp. 55-56. The record does not support plaintiffs' contentions.

The argument that the Union *caused* the trustees to fail to collect royalty payments *in order to* protect working miners is a corollary to the contention that the trustees purposefully failed to collect royalties in order to benefit the Union. As has already been discussed, *supra*, the record in this case does not disclose that the trustees purposefully failed to collect royalties, nor does it support the conclusion that they failed to collect royalties in order to benefit the Union by protecting the interests of working miners. It establishes no more than that the trustees were negligent in not pursuing their collection policies more diligently and in persisting in their tolerant approach to the problem for as long as they did. Thus, the short answer to plaintiffs' argument concerning the Union's participation in the trustees' purposeful breach of their fiduciary

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[50] The inquiry here is to be distinguished from the question whether, under agency principles, the Union may be held responsible for the trustees' negligent administration of the Fund. That question will be addressed *infra*.

duties is that because the underlying theorem is not true, the corollary is also untrue, that is, the Union could not have caused the trustees to fail to collect royalties in order to protect working miners because the record does not establish that the trustees acted unlawfully in order to protect working miners.

More to the point, there is no evidence in the record of this case that the Union, in order to benefit working miners, acted in bad faith in a manner that was detrimental to the Fund. The real thrust of plaintiffs' argument with respect to the Union is that because the Union's influence on the Fund was so permeant and pervasive, extending from having two of its officers serving as trustees to being the primary enforcing agent of the operators' duty to contribute to the Fund, and because the Fund wound up in severe financial straits that were at least partially due to the operators' delinquencies, this Court should infer arbitrary or bad faith discrimination by the Union against the pensioners in order to benefit the working miners. This is similar to the contention addressed *supra* that this Court should infer a purpose on the part of the trustees to benefit the Union from the fact that two of the three trustees were Union members. As with the earlier contention, I reject the proffered inference because there is insufficient evidence to support it.

The most relevant point regarding the Union's duty of fair representation of the pensioners is the Union's actual attitude towards the Fund as revealed in the record of this case. The record discloses almost uninterrupted support and assistance of the Fund by the Union. It was due to the efforts of the Union at the bargaining table that the Fund was established in the first place and that royalty rate increases were negotiated on a regular basis. Moreover, the Union was the most active participant in the attempts that were made to

enforce the operators' responsibilities to the Fund. It administered the notice of delinquency program and staged the few strikes that were called against delinquent operators; it was the driving force behind the intensive and forceful negotiations during the latter part of 1962 which resulted in the signing of letter agreements by many of the operators; and throughout the Fund's history, Union officials harangued and jawboned delinquent operators in an effort to make them comply with the agreement. *See, e.g.*, the countless references in the record to phone calls and letters from Joseph Kershetsky, who was the president of District 9. Most illustrative of the Union's good faith support of the Fund, though, are the large loans, most of which have been forgiven, which the Union has periodically made to the Fund to permit it to continue paying pensions to retired miners when, had it not been for the loans, the precarious financial position of the Fund would have forced a temporary suspension of pension payments. A total of $9,247,334 has been loaned over the years, of which all but $1,954,000 has been cancelled and forgiven. More than any other factor, these loans refute plaintiffs' contention that the Union has arbitrarily or in bad faith discriminated against the Fund and its beneficiaries.

Plaintiffs' other argument in support of their assertion that the Union has breached its duty of fair representation is that "the Union actively concealed from its pensioner members Union policy with respect to the collection of royalties and caused the Trustees to conceal policies followed by the Fund with respect to delinquent operators and the financial status of the Fund." Volume J, Plaintiffs' Trial Brief of the Law, pp. 55-56. It can be dealt with summarily. This contention is closely related to the argument that the Union caused the trustees to fail to collect royalties in

order to protect working miners, and is actually an allegation that the Union acted conspiratorily to intentionally conceal its unlawful conduct in order to prevent the victims from discovering it and taking appropriate action. As has already been pointed out, however, the Union did not act unlawfully with respect to the Fund, and thus there was no cause for the Union to be concerned with concealing any unlawful activity. More to the point, as has already been discussed in the analysis of the statute of limitations issue, *supra*, the Union may not be charged with the actions of the trustees which tolled the statute of limitations by preventing the plaintiffs from discovering the facts on which they base this lawsuit. Furthermore, those actions by the trustees, it should be reemphasized, did not amount to fraudulent concealment, because they were not performed with the intention of concealing the plaintiffs' cause of action or of covering up any wrongdoing by the trustees. Thus, even if the Union could be implicated in the trustees' failure to disclose the role played by operator delinquencies in the Fund's financial problems, such conduct would not amount to a breach of the duty of fair representation because, being unintential, it lacks the bad faith that *Vaca* v. *Sipes* requires.

In sum, therefore, the record does not establish that the Union breached its duty of fair representation of the pensioners.

2. *Common Law Duties and Section 302*

Plaintiffs maintain that the facts of this case establish four additional violations by the Union aside from a breach of its duty of fair representation. Specifically, plaintiffs argue that the Union (a) caused the trustees' intentional breach of their fiduciary duties; (b) breached its own fiduciary duties to the pensioners by

"secretly discriminat[ing] against the interests of the pensioner beneficiaries[,]" Volume J, Plaintiffs' Trial Brief of the Law, p. 68; (c) violated Section 302 by seeing to it that the Fund was not established for the sole and exclusive benefit of the employees; and (d) is liable, under principles of trust and agency law, for the trustees' negligent administration of the Fund. The first three contentions will only require brief treatment because most of these assertions were evaluated in the discussion, *supra*, of the duty of fair representation. The final argument will require closer examination.

Inasmuch as the contentions that the Union caused the trustees' intentional breach of their fiduciary duties and breached its own fiduciary duty to the pensioners are common law claims, justiciable in this Court under the doctrine of pendent jurisdiction, Pennsylvania law governs. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). For the same reason, Pennsylvania law also controls the claim that the Union is responsible for the trustees' negligent administration of the Fund. *Id.* Federal law, of course, controls the Section 302 claim.

Regardless which law applies, however, it is clear that the facts of this case do not support plaintiffs' initial three claims here. They argue first that the "Union through its domination and control of the Trustees caused the Trustees to breach their fiduciary duty to the Fund beneficiaries by failing to make any realistic efforts to collect the delinquent royalties and by failing to act solely for the benefit of the Fund beneficiaries. Thereby, the Union participated in the Trustees' breach of trust." Volume J. Plaintiffs' Trial Brief of the Law, p. 63. In support of this claim, they rely most heavily on Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971), where the court held the Union

liable for its "knowing participation" in the trustees' breach of their duty of loyalty, which consisted of permitting large sums of the bituminous coal industry's fund to remain in interest-free accounts at a union-owned and controlled bank. *Id.* at 1104. The court inferred that the union caused the breach of trust, largely on the basis of the trustees' positions of union leadership and the union's overall domination and control of the bituminous fund. I am unwilling to draw such an inference in this case, not because of the nature of the Union's relationship to the Fund, which seems to be just as close as in *Blankenship*, but because of the different nature of the trustees' activity in this case. The trustees in *Blankenship* were guilty of a breach of their duty of loyalty; the trustees here are not. They did not engage in the kind of activity which would reasonably support an inference that the Union participated in a breach of trust. There is no evidence in this case of trustee activity that was clearly detrimental to the Fund at the same time that it was beneficial to the Union and that was performed by the trustees in order to benefit the Union, the kind of evidence from which it would be reasonable to infer that the Union caused the breach of trust because the Union obviously had much to gain from such a breach. Moreover, as has already been discussed, *supra*, the record indicates that the Union has consistently assisted and supported the Fund, even to the point of lending almost $10,000,000 of its own funds in order to sustain it. That is not the kind of involvement that would support an inference that the Union caused the trustees to intentionally breach their fiduciary duties. Finally, this Court has already held that the trustees committed no intentional breach of trust, and, thus, the Union could not logically be found to have caused such a breach.

The claim that the Union breached its own fiduciary

duties to the pensioners is the common law counterpart of the contention that the Union breached its duty of fair representation. For the same reasons that the record does not support a finding that the Union violated the federal duty, *see supra*, it likewise does not support plaintiffs' common law claim that the Union "secretly discriminated against the interests of the pensioner beneficiaries." Volume J, Plaintiffs' Trial Brief of the Law, p. 68.

Nor does the record support the Section 302 claim against the Union that "the Fund was not 'established for the sole and exclusive benefit of the employees.' " Volume J, Plaintiffs' Trial Brief of the Law, p. 72.[51] Plaintiffs' argument here is vague and conclusory, but its essence is that the Fund was established and administered more with the interests of the working miners in mind than the interests of the pensioners. The record simply does not lend support to such a conclusion and it will not be accepted here.

The question remains whether the Union may be held responsible for the breach of trust which the record shows the trustees did commit, i.e., their negligent administration of the Fund in not pursuing their collection policies more diligently and in persisting in their tolerant approach for as long as they did. Plaintiffs maintain that the Union is liable under agency principles for any breach of trust committed by the trustees. *See* Volume Z-1, Plaintiffs' Memorandum in Support of Requests for Findings of Fact and Conclu-

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[51] As has already been noted, *supra*, in the discussion of jurisdiction, the record does indicate that the Fund was improperly structured during the period covered by this suit, in that two of the three trustees were Union officials. As was pointed out in that discussion, however, relief for such a structural violation is limited to injunctive relief.

sions of Law, pp. 25-39. In support of this argument, plaintiffs correctly state that the Labor Management Relations Act of 1947 made unions liable for the conduct of union officials in accordance with common law agency principles. NLRB v. International Longshoremen's & Warehousemen's Union, 283 F. 2d 558, 563 (9th Cir. 1960). Pointing to those principles, they maintain that the Union should be held liable for the conduct of its two officials who served as trustees either under the doctrine of vicarious liability or under the doctrines of apparent authority, ratification or estoppel.

The problem with the argument that the Union is liable under agency principles for the conduct of the Union officials who served as trustees is that it begs the question of whether the Union trustees were agents of the Union in their capacity as trustees. The answer would appear to be that they were not. Certainly Section 302(c)(5) does not seem to contemplate that the employee representatives who join with representatives of the employer in administering a health and welfare fund act in that capacity as agents of the union which happens to represent the employees in other aspects of their relationship with their employer. As has already been discussed, *supra*, Section 302(c)(5) contemplates the establishment of a trust, to be governed by the principles of state law. The employee and employer representatives who administer the trust are thus trustees to be held to the common law fiduciary standards which require them to administer the fund solely in the interests of the beneficiaries and independently of any other associations they might have. It would thus be contrary to the intent of Section 302(c)(5) for the trustees to act as agents of the Union in their administration of the fund.

Nor did the Union trustees in this case actually act

as agents of the Union in their administration of the Fund. An agent is one who acts on behalf of his principal and subject to his control following the consent by both parties that the agent is so to act. Restatement, Agency 2d § 1 (1958). The thrust of plaintiffs' argument that the Union should be held liable for the trustees' negligence on an agency theory is that the Union officials who served as trustees should be regarded as agents of the Union during their service as trustees primarily because they were Union officials during that time; the argument is that those trustees should be held to have acted on behalf of the Union because they themselves were Union members, and that therefore the Union should be automatically held responsible for any breach of trust committed by the trustees. The short answer to this agency contention is that it proves too much. If the Union trustees acted as agents of the Union in their capacity as trustees, then they would have violated their duty of loyalty to the beneficiaries. As has already been held, *supra*, there is no breach of the duty of loyalty in this case. Furthermore, to hold that the trustees acted in behalf of the Union when they were negligent in their administration of the Fund would be inconsistent, as negligence is by definition without motivation. Finally, to reiterate what was said *supra* in the discussion of the duty of loyalty, I am unwilling to infer that the Union trustees acted on behalf of the Union in their capacity as trustees from the mere fact that they were Union officials at the same time they were trustees. There would have to be additional evidence of such an improper allegiance by the Union trustees to support such an inference, and I find no such evidence in the record of this case.

Plaintiffs' appeal to the doctrines of apparent authority, ratification and estoppel is also unavailing.

The doctrine of apparent authority clearly has no bearing on this case because it is applied only when a servant injures a third party while acting openly on behalf of his master, albeit in excess of his actual authority. *See* Restatement, Agency 2d § 8 (1958). The allegation here is that the union trustees were acting openly as trustees when in reality they were serving the interests of the Union. Such a situation would be the reverse of apparent authority, and thus, apparent authority has no application to this case. Ratification also does not apply here, as, in order for an act to be subject to ratification, the one acting must have intended or purported to act for the ratifier. Restatement, Agency 2d § 85 (1958). As has already been discussed, the Union trustees did not intend or purport to act for the Union when they negligently administered the Fund. Finally, estoppel is completely inopposite here. The doctrine of estoppel operates in the law of agency with respect to a person on whose account an act was purportedly done; it holds such a person liable to "persons who have changed their positions because of their belief that the transaction was entered into by or for . . . [the person on whose account the act was purportedly done], if (a) he intentionally or carelessly caused such belief, or (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts." Restatement, Agency 2d § 8B(1)(a) and (b)(1958). That doctrine clearly has no application here, if only because the Union trustees did not purport to act for the Union in their administration of the Fund.

In sum, plaintiffs have offered no basis for imputing the trustees' negligence to the Union. It should be emphasized here that the Union treasury is not some nebulous font of wealth, but represents the contributions and savings of thousands of working miners; it should

not be lightly tapped because of the negligence of former trustees, notwithstanding the fact that some of them were Union officials at the same time they were trustees. As there is no basis for holding the Union responsible for the trustees' negligence, the Union must be absolved of any liability in this case.

VI. *Double Recovery and Recoupment*

The Union argues that in the event it is held liable for any or all of plaintiffs' claims in the instant suit, it should be permitted to reduce its damages by the total amount which it has loaned the Fund over the years since 1951. The facts relevant to this argument, none of which are in dispute, are as follows: The Union has periodically loaned the Fund sufficient sums of money to permit it to continue paying pensions to retired miners when, had it not been for such loans, the precarious financial status of the Fund would have forced a temporary suspension of pension payments. The specific purpose of these loans was to enable the Fund to continue making such payments. Although most of the loans were made by the International Union, the individual districts also occasionally loaned money to the Fund. Specifically, District 1 made loans totalling $366,791.99; District 7, $91,543; and District 9, $155,000. The balance, or $8,633,999.01, was loaned by the International. Of the total amount loaned, all but $1,954,000 loaned since January, 1974 by the International Union to the Fund has been cancelled and forgiven. Although most of the loans were forgiven prior to the filing of the instant lawsuit, a total of $2,885,000 was forgiven on January 21, 1970, or exactly five years after the institution of this suit.

The Union maintains that any recovery by plaintiffs in this suit should be reduced by the amount of the loans under either of two theories: the rule prohibiting

double recoveries or the doctrine of equitable recoupment. Plaintiffs, on the other hand, disagree that any recovery should be reduced by the amount of the loans, and advance several arguments in support of their position. Because this Court agrees that the rule prohibiting double recoveries limits the plaintiffs' recovery in this case to the difference between the amount of the loans and the damages proven by the plaintiffs, it is not necessary to address the complex issues raised by the recoupment argument.[52]

The Union relies on the general principle of tort law that provides that when a plaintiff's injuries are accompanied by benefits that actually diminish damages, he is limited to a recovery which will make him whole. *See* Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964). Applying that principle to this case, the Union argues that, to the extent that the Fund received loans from the Union to enable it to continue paying pensions, any recovery in this case would be duplicative and, in effect, an impermissible double recovery. Furthermore, the Union maintains, the only exception to this principle, the so-called collateral source rule, does not apply to this case. The collateral source rule requires a tortfeasor to pay in full the damages suffered by the plaintiff, without credit for amounts received from sources

[52] Among those issues are whether recoupment may not be asserted because the claim based on the loans would not be enforceable against the Fund to the extent that the loans were forgiven, on the theory that recoupment requires the existence of a claim against the plaintiff that would be enforceable in an independent action; and whether recoupment is barred because the claims based on the loans do not arise out of the same transaction as those asserted by plaintiffs. *See* Rothensies v. Electric Battery Co., 329 U.S. 296 (1946), *rev'g* Electric Storage Battery Co. v. Rothensies, 152 F. 2d 521 (3d Cir. 1945).

collateral to or independent of the defendant, for example, from an insurer or a donor. *See generally id.* The fundamental justification for the rule is that a defendant wrongdoer should not get the benefit of payments that come to a plaintiff from a collateral source, even though, as a result, the plaintiff may thereby receive double compensation for his injuries. The Union maintains that the collateral source rule does not even apply to this case, inasmuch as the loans received by the Fund came from the Union itself, a source that is identical, not collateral, to the defendant in this case. The Union maintains further that even if the source of the loans were found to be collateral, the rule still would not apply here because the Pennsylvania courts would not permit a double recovery under the facts of this case. Plaintiffs in turn dispute the factual premise of the Union's position by maintaining that "the loss sustained by the Fund was not lessened in any way by loans from defendant." Plaintiffs' Reply Brief Concerning All Parties' Requests for Findings of Fact and Conclusions of Law, at p. 59. Plaintiffs also argue that the loans were in effect gifts to the Fund by the Union, as evidenced primarily by the Union's later forgiveness of most of the loans, and that for that reason they do not preclude recovery in this case.

Upon analysis, the Union's position appears correct. Plaintiffs' contention that the loans did not lessen the loss sustained by the Fund simply does not withstand scrutiny. The alleged loss in this case is the loss of income to the Fund because delinquent operators failed to make their contributions. The loss resulted in the Fund's inability to maintain the established pension payments. The loans, in turn, were made for the specific purpose of enabling the Fund to continue making payments when, were it not for the loans, payments would have to have been discontinued. At least part of the

explanation for the Fund's inability to make payments at the time of the loans was the reduced income caused by the delinquencies in operator contributions, for which the plaintiffs seek to hold the defendants liable in this suit.[53] Because the loans enabled the Fund to continue making payments, they lessened the loss sustained by the Fund allegedly as a result of defendants' activities.

Moreover, the law is clear as the Union maintains, that the collateral source rule is inapplicable when the source of compensation to the plaintiff has been the defendant. Feeley v. United States, 337 F. 2d 924, 932 (3d Cir. 1964); Olivas v. United States, 506 F. 2d 1158, 1163 (9th Cir. 1974). Furthermore, this result is not changed by regarding the loans as gifts. Feeley v. United States, *supra*. In any event, this Court is not inclined to regard the loans as gifts. The fact that financial assistance was extended to the Fund in the form of loans rather than as outright gifts is strong evidence that the assistance was not intended to be a donation. And the forgiveness of the loans, rather than indicating an intent to make a gift, was more likely a recognition that the loans could never be repaid by the Fund. Therefore, because the loans lessened the loss sustained by the Fund, and because they were made by the Union, any recovery against the Union should be limited to the difference between the amount of the loans and the damages proven by the plaintiffs.

This holding, however, does not apply to the trustees, inasmuch as the loans came from the Union, a source independent of them, and thus the collateral source rule would appear to apply to the claims against the

[53] The other explanation for the Fund's reduced income was the decline in anthracite production. *See* text and footnote at footnote 1, *supra*.

trustees. The trustees have not contended that any recovery as to them should be reduced by the amount of the loans, and the issue as to the trustees has not been briefed by the parties. Nevertheless, it would appear that the plaintiffs' case against the trustees is unaffected by the loans from the Union. See Bouldwin v. Yellow Cab Co., 410 Pa. 31, 32-33 (1963).

VII. *Summary*

The following are this Court's holdings in this case:

1. This Court does not have subject-matter jurisdiction of plaintiffs' claims;

2. However, assuming that there is jurisdiction,

A. the statute of limitations was tolled by the trustees' actions and does not bar this suit;

B. the trustees are not liable either for violation of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, or for breach of the common law duty of undivided loyalty of a trustee;

C. although past trustees were guilty of a breach of a trustee's duty to enforce claims by virtue of their negligent handling of the problem of operator delinquencies, none of the trustees who are defendants in this case may be held liable for that breach;

D. the Union is not liable under any of the theories advanced by plaintiffs; and

E. if the Union is liable, it is entitled to have deducted from any recovery against it an amount equal to the total sum it has loaned the Fund since its inception.

In accordance with the above, judgment will be entered for the defendants.

/s/ William J. Nealon
United States District Judge

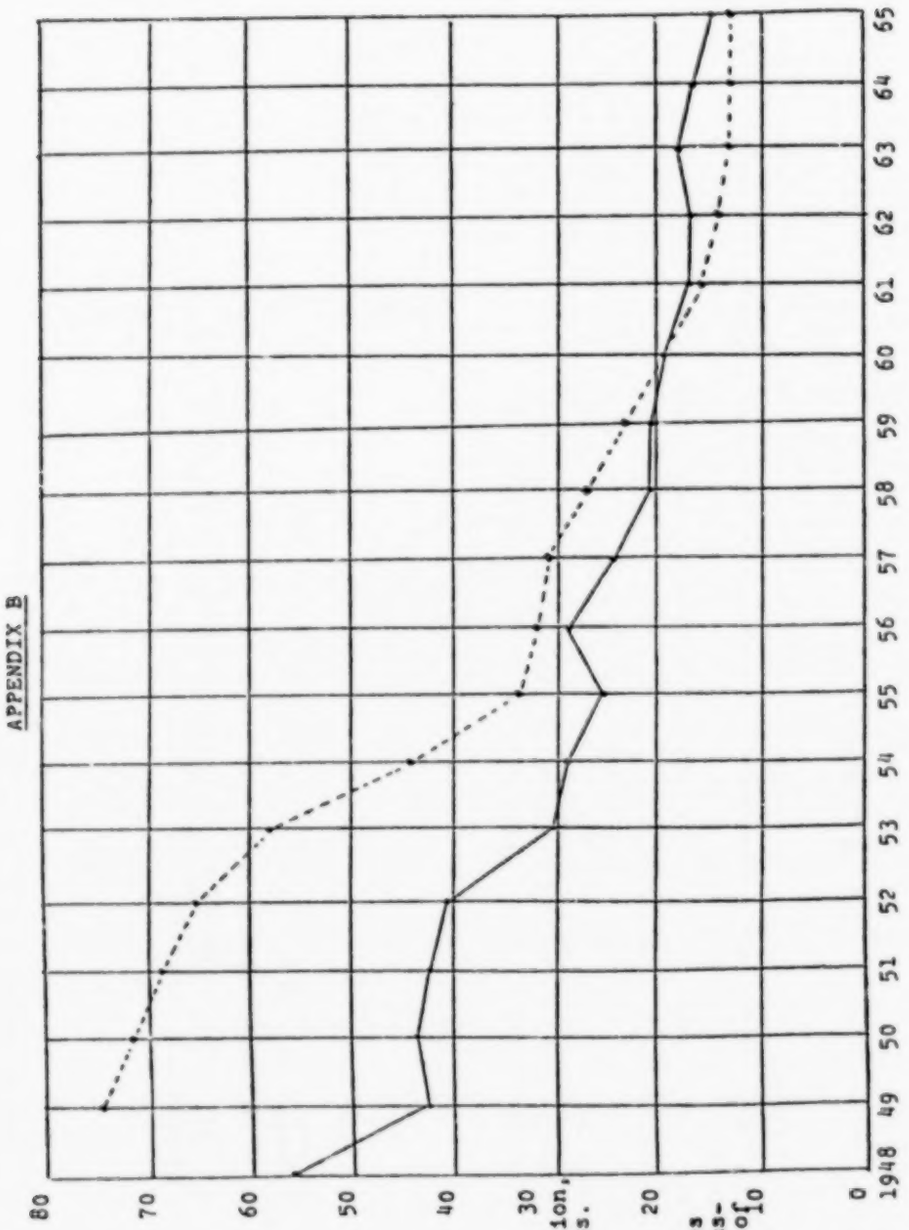
Dated: April 13, 1976.

APPENDIX A[6]

Yr.	Total operator contributions [1]	Total cos.[2]	Total cos. del.[3]	Oper.[2]	Non-oper.[2]	Cumulative total delinquencies [2]	Operating [2]	Non-Operating [2]	Suits commenced [2]	Amount claimed in suit	Agreements made
54[3]	$10,009,495.19	90	46	33	13	$2,479,001.29	$ 937,503.16	$1,541,498.13	11	$3,275,685.90	1
55	10,204,947.36	110	83	61	22	8,676,513.61	6,901,641.93	1,774,871.68	1	51,030.70	2
56	11,850,418.69	111	82	55	27	8,534,254.41	6,311,455.15	2,222,799.26	4	168,297.84	4
57	10,688,687.26	117	92	54	38	8,080,328.26	4,489,155.60	3,591,172.66	7	98,116.89[4]	2
58	8,266,068.91	123	101	51	50	8,225,711.23	4,411,071.31	3,814,639.92	6	20,033.20[4]	1
59	10,328,634.36	114	97	33	64	7,828,983.91	3,478,892.16	4,350,091.75			
60	7,897,269.75	119	111	37	74	9,672,967.65	4,190,197.00	5,482,770.65			
61	7,082,283.13	127	118	39	79	11,425,912.36	5,019,648.52	6,406,263.84			
62	8,240,869.23	49		43[5]			5,184,260.50				17
63	8,771,512.32	43		35			5,033,093.74				
64	8,354,229.11	45		27			4,135,483.22		2	207,148.20	
65	7,155,175.81	48		33			4,525,179.79		11	701,053.70	
66	5,996,084.99	56		38			5,658,836.09		18	5,864,160.40	
67	4,911,355.70	59		42			6,131,827.64		4	415,654.66	
68	5,620,206.58	62		33			6,339,110.57		2	159,914.35	

[1] These figures are taken from Defendants' Requests for Findings of Fact Nos. 72 A and 72 B.
[2] These figures are taken from Plaintiffs' Requests for Findings of Fact No. 30.
[3] As of end of year indicated.
[4] Four suits in 1957 and four in 1958 were commenced by summons and no complaint was filed. Thus, no specific amounts were claimed in these suits.
[5] In 1962, the Trustees changed their method of reporting by removing non-operating companies from the list.
[6] These figures have been taken from proposed findings of fact submitted by one party and agreed to by the other party in each instance. There has been no effort made to independently verify the accuracy of the figures.

APPENDIX B



ORDER

Now, this 13th day of April, 1976, in accordance with memorandum this day filed, judgment is hereby entered for the defendants.

/s/ William J. Nealon
United States District Judge

APPENDIX C

STATUTES INVOLVED

Section 301 of the Labor-Management Relations Act (61 Stat. 156); 29 U.S.C. 185) provides as follows:

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agents; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by

or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 302 of the Labor-Management Relations Act (61 Stat. 157; 29 U.S.C. 186) reads as follows:

RESTRICTIONS ON PAYMENTS AND LOANS TO EMPLOYEE REPRESENTATIVES, LABOR ORGANIZATIONS, OFFICERS AND EMPLOYEES OF LABOR ORGANIZATIONS, AND TO EMPLOYEES OR GROUPS OR COMMITTEES OF EMPLOYEES; EXCEPTIONS; PENALTIES; JURISDICTION; EFFECTIVE DATE; EXCEPTION OF CERTAIN TRUST FUNDS

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer

or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Com-

merce Act [1]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs

sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical and hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office

of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its

officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.[2]

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28[3] (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101 to 115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 77-612 OCTOBER TERM, 1977

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS,
Respondents,

and

EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

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Respondent pensioned miners seek in this action redress for the wrongs inflicted on their pension fund by their Union. The pensioners averred and proved, and the District Court found, that the UMW for two decades dominated the management of the Fund in violation of federal law, that the UMW trustees in a conflict-of-interest situation breached their fiduciary duties, and that large sums of mine operator pension fund contributions were thus lost. The District Court nevertheless concluded that the pensioners had failed to sustain their federal claims and that it was without power to consider the pensioners' pendent state claims.

The Court of Appeals, without dissent, vacated and remanded for further proceedings, holding that the pensioners had averred and shown federal claims of sufficient substance to support the exercise of pendent jurisdiction over the pensioners' state claims and that the District Court had misapplied the burden of proof under the facts of this case. The UMW now seeks review of that nonfinal decision.

REASONS FOR DENYING THE WRIT.

I. The UMW in its 50-page Petition, never once mentioning "pendent jurisdiction", the holding in the Court of Appeals, ascribes to that decision a content, breadth and public importance which it does not have, and, by isolating *dicta*, attempts to conjure up conflicts with decisions of this Court and other Courts of Appeals where no meaningful conflict exists 4

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B. Because of the enactment of ERISA, establishing a comprehensive federal regulatory scheme, including provisions establishing exclusive federal court jurisdiction over, and superseding all state laws relating to, pension funds, the Court of Appeals' analysis as to the jurisdictional reach of the Taft-Hartley Act with respect to breaches of fiduciary duty by union-controlled pension fund trustees is wholly lacking in prospective significance 6

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II. After 14 years of litigation, three separate refusals to dismiss by the District Court, a prior finding of probable federal question jurisdiction by the Court of Appeals, a trial and decision on the merits, and a finding by the District Court that the federal labor laws had been violated, the Court of Appeals was surely correct in holding that the pensioners' federal claims were not so frivolous as to afford an insufficient predicate for pendent jurisdiction 13

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QUESTIONS PRESENTED

1. Should this Court exercise its certiorari power to review a carefully restricted finding of pendent jurisdiction under the unusual facts of this case, where there is no meaningful conflict with any decision of this Court or other Courts of Appeals, and where the advent of ERISA has so changed the federal statutory scheme regarding pension funds as to render prospective application of the decision below unlikely in the extreme?

2. Did not the Court of Appeals, after 14 years of litigation, three separate refusals to dismiss by the District Court, a prior finding of probable federal question jurisdiction by the Court of Appeals, a trial and decision on the merits, and the finding by the District Court that the federal labor laws had been violated, correctly hold that the pensioners' federal claims were not so frivolous as to afford an insufficient predicate for pendent jurisdiction?

STATEMENT OF THE CASE

This action was commenced in 1963 by respondents ("pensioners") as a diversity action against the petitioner Union ("UMW"). The action was later dismissed for lack of diversity, and recommenced by the pensioners in 1965 with jurisdiction predicated upon § 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) ("LMRA"). The essence of the pensioners' claim was that the UMW had breached the duty owed its retired members by failing properly to enforce the collective bargaining agreement with the anthracite mine operators ("operators"), in that there had been a pervasive failure by the operators to pay the agreed amounts to the Anthracite Health and Welfare Fund ("Fund") for pensions, and the UMW had deliberately tolerated those breaches. The UMW's motion to dismiss the 1965 complaint was denied, renewed, and denied again. Thereafter the UMW was granted a certificate under 28 U.S.C. § 1292(b) and the Court of Appeals (at 400 F.2d 103) held that the pensioners had incorrectly asserted jurisdiction under LMRA § 301, but that the pensioners' claim could be cognizable under 28 U.S.C. § 1337 as a breach of the duty of fair representation in light of *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

Upon remand in 1969 the pensioners filed an amended complaint asserting jurisdiction under, *inter alia,* 28 U.S.C. § 1337 (breach of the duty of fair representation), LMRA § 301, 29 U.S.C. § 185 (breach of a collective bargaining agreement) and LMRA § 302, 29 U.S.C. § 186 (breach of the "equal representation" and "sole and exclusive benefit" requirements). The UMW again moved to dismiss, and at the conclusion of discovery in the spring of 1974, renewed its motion. On June 19, 1974, the District Court again refused to dismiss, and the trial was had non-jury the following month.

The evidence, which was almost exclusively documentary and largely undisputed, showed, and the District Court found, that for more than two decades (from 1946 through 1967, at least) the UMW had dominated and controlled the management of the Fund (154a)[1], that there had been a "clear" (76a) violation of the equal representation requirement of LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5), since two of the three trustees managing the Fund had at all times been high UMW officers, that the UMW trustees had breached their fiduciary duties by failing diligently to collect the royalties owed to the Fund (140a), that the Fund trustees had abdicated their collection responsibility to the UMW which had "unhesitatingly accepted" (68a) such responsibility, and that the UMW and the UMW's trustees, who had a conflict of interest (122a), were reluctant to take vigorous enforcement action because it might result in working miners losing their jobs. Despite these findings, the District Court decided that federal question jurisdiction had not been shown and that it lacked power to consider the pensioners' pendent state law claims. Nevertheless, it did go on to consider the pensioners' claims and found for the UMW, holding that the pensioners had failed to sustain their burden of proof as to the UMW's liability.

The Court of Appeals vacated the District Court's judgment, and remanded for further proceedings in the light of the fiduciary standards of conduct and burden of proof set forth in its opinion. 556 F.2d 190. The UMW next filed a Petition for Rehearing and Suggestion for Rehearing *in Banc,* which was denied. It then filed the instant Petition for a Writ of Certiorari.

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[1] Record citations are to the Appendix in the UMW's Petition.

REASONS FOR DENYING THE WRIT

I. THE UMW IN ITS 50-PAGE PETITION, NEVER ONCE MENTIONING "PENDENT JURISDICTION", THE HOLDING IN THE COURT OF APPEALS, ASCRIBES TO ITS DECISION A CONTENT, BREADTH AND PUBLIC IMPORTANCE WHICH IT DOES NOT HAVE, AND, BY ISOLATING DICTA, ATTEMPTS TO CONJURE UP CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS WHERE NO MEANINGFUL CONFLICT EXISTS.

The essential holding of the Court of Appeals, with respect to jurisdiction, was that the pensioners had shown federal claims of sufficient substance to afford a basis for the exercise of pendent jurisdiction over pensioners' state law claims. (29a) On the merits, the Court held that, under either federal or state law, when a union supplants pension fund trustees, arrogates to itself their functions and assumes their duties, and those duties are improperly discharged, a basis for liability has been shown. (42a)

Neither of these holdings is in the least surprising, or constitutes any departure from, or expansion of, existing law. Rather they represent the application of well-settled principles to the peculiar facts of this case.

The UMW in its Petition determinedly ignores the narrow reach of the Court's holding, and attempts to characterize it as one which will open the floodgates to massive federal court intervention in the management of pension trusts, thus evidencing a predisposition (Petition, p.50) on the part of the Court of Appeals to find against the UMW. By selecting isolated *dicta* from the Court's analysis, the UMW contends that conflicts exist with two decisions of this Court, *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division,* 404 U.S. 157 (1971) and *Arroyo* v. *United States,* 359 U.S. 419 (1959), and with several decisions of other Courts of Appeals. It is submitted that neither the contentions made, nor the extravagant apprehensions voiced, have any basis in law or in fact.

A. The Court of Appeals carefully limited its holding to a finding of the existence of pendent jurisdiction.

The Court of Appeals in its Opinion analyzed the three bases for federal question jurisdiction asserted by the pensioners, i.e. breach of the duty of fair representation, and LMRA §§ 301 and 302. The UMW alleges that the Court of Appeals *held* that jurisdiction existed under each of these theories.

But this mischaracterizes the holding of the Court below. It is understandable, given the strictures of Rule 19 and the nature of a Petition for Writ of Certiorari, that the UMW would want to exaggerate the breadth and potential impact of the decision below, but the exaggeration here is egregious.

At no less than six separate points in its decision, the Court below emphasized that it was holding *only* that the pensioners' federal claims were sufficiently non-frivolous to support the exercise of pendent jurisdiction. (6a, 11a, 15a, 19a, 28a and 29a) The limitation with respect to a finding only of pendent jurisdiction was made in the context of LMRA § 301 (11a), § 302 (19a) and fair representation (15a). In sum, the Court below held: "We conclude that in the circumstances of this case federal law causes of action of sufficient substance to support federal question jurisdiction were pleaded. Moreover, we conclude

that the Court could properly, as ultimately it did, try the pendent state law causes of action." (6a)

B. Because of the enactment of ERISA, establishing a comprehensive federal regulatory scheme, including provisions establishing exclusive federal court jurisdiction over, and superseding all state laws relating to, pension funds, the Court of Appeals' analysis as to the jurisdictional reach of the Taft-Hartley Act with respect to breaches of fiduciary duty by union-controlled pension fund trustees is wholly lacking in prospective significance.

The UMW in its Petition complains that the holding of the Court of Appeals opens the way for establishment of a federal common law of pension and welfare trust fund administration, and thus constitutes an enormous expansion of federal court jurisdiction over pension fund affairs.

It is true that, in analyzing pensioners' claims under the Taft-Hartley Act to determine whether they had sufficient substance to support the exercise of pendent jurisdiction, the Court of Appeals expressed views supporting the proposition that, under the circumstances of this case, jurisdiction under the Taft-Hartley Act existed. However, since the holding of the Court of Appeals was expressly limited to a finding only of pendent jurisdiction, which required a finding only that the federal claims asserted by pensioners were non-frivolous, any views going beyond a finding of non-frivolity constitute mere *dicta*.

Nevertheless, assuming *arguendo* that the Court of Appeals held that jurisdiction had been shown under the Taft-Hartley Act, it would constitute a holding without prospective importance.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, has worked a radical transformation of the federal law applicable to pension funds. Even the UMW concedes (Petition, p.37, n.25) that ERISA establishes "pervasive pension regulations including fiduciary standards and federal jurisdiction to remedy violations of that statute and regulations."

ERISA clearly applies to Taft-Hartley pension trusts. See § 1002(1) and § 1003. ERISA defines a "fiduciary" with respect to a pension fund, under § 1002(21)(A), as a person who exercises authority or control respecting management or disposition of its assets, a definition which would have applied to the UMW under the circumstances of this case had ERISA then been in effect. Moreover, under ERISA a fiduciary is liable for the breach of duty of a co-fiduciary if he knows of the breach and fails to make reasonable efforts under the circumstances to cure the breach. § 1105.

Under § 1104, ERISA federalizes the fiduciary obligations of pension fund trustees, and under § 1109 creates a cause of action, including a damages remedy, for breach of fiduciary duty. Lastly, under § 1132(e)(1) ERISA vests exclusive jurisdiction in the federal courts over civil actions brought to recover damages for breach of fiduciary duty.

Whatever may have been the state of the law prior to the enactment of ERISA in 1974, it is clear that the type of claim asserted by the pensioners in the instant action, when arising in the future, will fall within the coverage of ERISA. Thus, even assuming that the Court of Appeals' decision has the breadth and content regarding the jurisdictional reach of the Taft-Hartley Act over breaches of fiduciary duty by union-dominated pension fund trustees ascribed to it by the UMW, it is without prospective significance. The statutory changes wrought by ERISA will preclude this issue arising in the future and review by this Court, even assuming that the UMW's

characterization of the Court of Appeals' decision is accurate, is not therefore warranted.

C. There is no conflict here with any decision of this Court.

The UMW asserts that the Court of Appeals' decision conflicts with this Court's decision in *Arroyo* v. *United States,* 359 U.S. 419 (1959), pointing to the observation of Justice Stewart (at 427): "The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection [§ 302(e)]".

Arroyo involved the question as to whether the trustee of a welfare fund, who embezzled money from the fund, had committed a crime in violation of § 302(b). This Court examined the language of the statute and noted that it prohibited unlawful payments to welfare funds, but that payments lawfully made to the fund and later embezzled did not fall within the prohibition of the Act. In reaching this conclusion the Court examined the legislative history and noted Congress' express concern "with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." (at 426) Embezzlement, however, had not been one of the express concerns of Congress, and it was in this context that the above-quoted observation of Justice Stewart was made. The instant case is not a criminal action, but is rather a civil action seeking redress for the UMW's violation of § 302, by dominating and controlling the Fund for its own purposes, precisely the "abuse by union officers of the power which they might achieve if welfare funds were left to their sole control" which this Court found to be the particular focus of Congressional concern. (at 426)

The UMW also asserts that the decision below conflicts with this Court's decision in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971). The UMW alleges (Petition, pp. 42-43) that this Court stated, in *Pittsburgh Plate Glass,* "that the fair representation duty does not extend to retirees, 404 U.S. at 181 and n.20. . . ." But no such statement is set forth therein.

This Court, in *Pittsburgh Plate Glass,* was concerned with the question as to whether the benefits of retired persons, who were not members of the bargaining unit, were a mandatory subject of bargaining. This Court held that they were not, reasoning that the retired persons were not members of the bargaining unit, that the union therefore had no duty to represent them and the employer had no duty to bargain with respect to their benefits.

Hence the question presented in the instant case, as to whether, once a union undertakes to represent retired persons and the employer agrees to treat with the union on that basis, a federal duty of fair representation arises, was not involved in *Pittsburgh Plate Glass.*

To the extent that the Court touched upon this issue in *Pittsburgh Plate Glass* at all, it suggested that such a duty does exist. The Court affirmatively recognized in *Pittsburgh Plate Glass* that a union could properly represent and bargain for retirees if the employer agreed. The Court also noted, 404 U.S. at 173 (n.12), that "in representing retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents. . . ." This duty "to balance the interests of all its constituents" is precisely what the duty of fair representation is all about.

The UMW advances two reasons why a duty of fair representation should not be construed to arise from a union's actual representation of pensioners. First, the union asserts that the imposition of such a duty would

create "a veritable minefield of legal hazards" (Petition, p.45) because, having once undertaken to represent pensioners, the union could be "exposed to a duty of fair representation challenge should it for overall strategic reasons abandon permissive bargaining." (Petition, p.46) But this Court flatly stated in *Pittsburgh Plate Glass* (at 181) that no such duty to continue representation exists. "Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again."

The UMW contends that the imposition of a duty of fair representation, when a union does in fact undertake to represent retirees, would give rise to "additional legal duties" (Petition, p.46) where none would otherwise exist. But under state law an agent already owes a duty of loyalty and good faith, Restatement, Agency 2d § 13, and the implication of a parallel federal duty, while it has jurisdictional implications, does not functionally alter the nature of the duties required.

There is thus no conflict here presented with any decision of this Court.

D. While isolated facets of dicta in the decision below are not entirely harmonious with a few decisions of other courts, no conflict requiring resolution is presented.

The UMW makes perfunctory obeisance to the requirements of this Court's Rule 19 by referring to a number of decisions from other Courts of Appeals, extracting selected bits of *dicta* from the decision below, and arguing that square and important conflicts are thus shown. It is true that all of the observations of the various Courts of Appeals regarding the meaning and scope of LMRA §§ 301 and 302 are not entirely harmonious, and

in view of the nature of those sections and the complexity of the problems with which they deal, it would be surprising were the situation otherwise.

The UMW argues (Petition, p.43) that the decision below is contrary to the construction of *Pittsburgh Plate Glass* set forth in *Royal Typewriter Co.* v. *National Labor Relations Board*, 533 F.2d 1030, 1039 & n.10 (8th Cir. 1976) and *Bricklayers, etc, International Union* v. *Stuart Plastering Company, Inc.*, 512 F.2d 1017, 1029 (5th Cir. 1975). In *Royal Typewriter Co.* the Court was concerned with the question as to whether, when an employer initially offers to discuss a nonmandatory subject of bargaining with the union, this precludes a subsequent refusal to bargain further on that subject. The Court held, citing *Pittsburgh Plate Glass,* that there was no duty to continue to bargain over what was not a subject of mandatory bargaining in the first instance.

Bricklayers, etc., International Union was concerned with the question as to whether, absent a written pension plan as required by LMRA § 302(c)(5), evidence showing that some payments had been made by the employer could supply the element of definiteness that Congress prescribed. The Court cited *Pittsburgh Plate Glass* for the proposition that past practice between an employer and a union cannot change the written-plan requirement of the law.

Neither *Royal Typewriter Co.* nor *Bricklayers, etc., International Union* had anything to do with the duty of fair representation, and neither is in any way "contrary" to the decision below.

Snider v. *All State Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973), which is cited by the UMW at eight different points in its Petition, not only presents no conflict but actually supports the decision below. In *Snider,* members of a union sought an injunction and other relief

alleging violations of LMRA § 302. The District Court granted the injunctive relief, but denied all further relief for lack of jurisdiction. The Court of Appeals agreed with the District Court's narrow reading of § 302(e) but held that the District Court had pendent jurisdiction over the related state law claims.

> The exercise of pendent jurisdiction over state law claims is particularly appropriate in actions brought for injunctive relief under Sec. 302(e) because the state claims based on abuse of welfare trusts are closely tied to questions of federal labor policy. See *Giordani* v. *Hoffmann,* 295 F.Supp. 463, 471-472 (E.D.Pa. 1969); *Insley* v. *Joyce,* 330 F.Supp. 1228, 1234 (N.D.Ill. 1971). (at 391-92)

Although it found that the District Court could properly have exercised pendent jurisdiction over the state law claims, the Court in *Snider* held that it did not abuse its discretion in declining to exercise such jurisdiction. In the instant case, the District Court did, in fact, adjudicate the pensioners' claims on the merits, and the Court of Appeals held, consistently with *Snider,* that the District Court had pendent jurisdiction so to do.

The other cases cited by the UMW, in the context of § 302(e), as reflecting conflicts with the decision below,[1] did not present situations in which there was allegation and proof, as in the instant case, of structural violations of § 302(c)(5), nor do any of those cases consider the issue of pendent jurisdiction.

The cases cited as square conflicts in the context of § 301 similarly present no problem. *Miller* v. *Davis,* 507 F.2d 308 (6th Cir. 1974) involved a claim for pension

[1] *Prescription Plan Service Corp.* v. *Franco,* 552 F.2d 493 (2d Cir. 1977), *Lugo* v. *Employees Retirement Fund,* 529 F.2d 251 (2d Cir. 1976), and *Bowers* v. *Ulpiano Casal, Inc.,* 393 F.2d 421 (1st Cir. 1968).

benefits allegedly wrongfully withheld by the pension fund trustees, where jurisdiction was asserted under LMRA § 301(c), 29 U.S.C. § 185(c). The instant action involves subsection (a), not subsection (c). Moreover, the pensioners do not assert that § 301(a) establishes subject matter jurisdiction over claims for improper administration of union trust funds. It is suits for violation of collective bargaining agreements with which § 301(a) is concerned, and in the instant action there is no question that there was pervasive violation by the operators of the provisions of the collective bargaining agreement.

Mumford v. *Glover,* 503 F.2d 878 (5th Cir. 1974) involved a finding by the Court of Appeals that the collective bargaining agreement had not, in fact, been violated, and that there was therefore no basis for § 301 jurisdiction.

It is impossible completely to reconcile every nuance of the cases cited above, either among themselves or each with the opinion in the Court below, but it is submitted that there is no necessity to do so. None of these decisions presents a square conflict with the holding below, and to the extent there is some inconsistency among *dicta* it has been rendered of no moment by the advent of ERISA.

II. AFTER 14 YEARS OF LITIGATION, THREE SEPARATE REFUSALS TO DISMISS BY THE DISTRICT COURT, A PRIOR FINDING OF PROBABLE FEDERAL QUESTION JURISDICTION BY THE COURT OF APPEALS, A TRIAL AND DECISION ON THE MERITS, AND A FINDING BY THE DISTRICT COURT THAT THE FEDERAL LABOR LAWS HAD BEEN VIOLATED, THE COURT OF APPEALS WAS SURELY CORRECT IN HOLDING THAT THE PENSIONERS' FEDERAL CLAIMS WERE NOT SO FRIVOLOUS AS TO AFFORD AN INSUFFICIENT PREDICATE FOR PENDENT JURISDICTION.

Were this Court to grant a Writ of Certiorari, the issue presented would be whether the Court of Appeals erred in its holding that the federal claims shown by the pensioners were of sufficient substance to support the exercise of pendent jurisdiction. It is an important consideration here in weighing the necessity of Certiorari that the result reached by the Court of Appeals was correct.

There can be no question that in 1963, 1965 and 1969, when the pensioners filed their complaints, they found themselves in a jurisdictional thicket. The 1963 and 1965 complaints pre-dated *Vaca* v. *Sipes, supra,* and the 1969 amended complaint pre-dated *Pittsburgh Plate Glass, supra.* In hindsight the jurisdictional averments contained in the pensioners' pleadings may not have been as artful as prescience could have had them, but there are certain points which are clear.

The pensioners in their 1969 amended complaint averred violations of § 302, and the District Court after trial found such a violation to have been proved. As the Court of Appeals below noted, and as the UMW in fact concedes, there is no question that the allegation and proof of structural violations of § 302 establishes federal question jurisdiction. (18a, n.18)

The UMW argues that the pensioners did not assert violations of § 302 until their amended complaint in 1969, by which time the "equal representation" violation had been cured by the 1967 resignation as trustee of UMW District President Brennan. But that was not the only violation averred by the pensioners; it was the only violation found by the District Court to have been proved. The fact that pensioners were unable to persuade the District Court to find other violations does not mean that pensioners' allegation and proof of such violations was frivolous.

The UMW also argues that the allegation of § 302 jurisdiction in the 1969 amended complaint does not relate back, under F.R.C.P. 15(c), to the original complaint. But it is quite clear from the first sentence of Rule 15(c) that such an amendment does relate back. Moreover, the UMW is making this argument in its Petition for the first time,[3] although pensioners, before the Court of Appeals, argued the effect of Rule 15(c) in both their Brief for Appellants and their Reply Brief. It is submitted that this Court should not grant a Writ of Certiorari to consider an argument not raised below.[4]

The key question is whether the § 302 claims asserted by the pensioners, as well as their § 301 claim and their claim under § 1337 for breach of the duty of fair representation, are clearly "immaterial and made solely for the purpose of obtaining jurisdiction. . . ." *Bell* v. *Hood,* 327 U.S. 678, 682 (1946). In *Hagans* v. *Lavine,* 415 U.S. 528, 536-38 (1974), this Court held that a federal claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised could be the subject of controversy.

There has been no such foreclosing decision by this Court, not in 1963, not in 1965, not in 1969 and not today.

The decision of the Court of Appeals below, holding that the pensioners' federal question claims were of sufficient substance to support the exercise of pendent jurisdiction was therefore entirely correct.

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[3] The Court of Appeals noted (18a): "The defendants do not dispute that this was an amendment which, under Fed. R. Civ. P. 15(c), could properly relate back to the filing of the § 301 complaint in 1965."

[4] See also 28 U.S.C. § 1653: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The intent of Congress in enacting this section was "to avoid dismissals on technical grounds . . . .", *Miller* v. *Davis,* 507 F.2d 308, 311 (6th Cir. 1974), which is exactly the opposite of what the UMW argues for in the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
DEC 19 1977
MICHAEL RODAK, JR., CLERK

No. 77-612

IN THE

Supreme Court of the United States

October Term, 1977

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS,
Respondents,

and

EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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Section 301, 29 U.S.C. § 185 ..... 3, 4, 6, 9, 10, 12
Section 302, 29 U.S.C. § 186 ..... 3, 4, 5, 6, 7, 8, 9

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-612

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS,

Respondents,

and

EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

Introduction

In its Petition, the UMWA comprehensively described the background of this litigation and set forth the numerous areas of conflict between the Third Circuit's decision and decisions of this Court and other Courts of Appeals with respect to important questions

of Federal law. Respondents have filed a Brief in Opposition to the Petition. Petitioner would not further burden the Court but for the unusually misleading portrayal of the record and decisions below presented by the Respondents and several thinly-veiled but vital concessions by which Respondents seek to disassociate themselves from particular positions taken by the Court of Appeals. This Reply is limited to a concise rebuttal.

Statement of the Case

Respondents' characterization of the District Court's findings and of the record evidence (Respondents' Br., p. 3) is notable both for its omissions and its misstatements. Respondents' recitation overlooks the District Court's findings that the large operator delinquencies to the Anthracite Fund occurred incident to an industrial collapse of monumentally catastrophic proportions (54a-56a); that the UMWA made generous loans to the Anthracite Fund which were never repaid and have for the most part been forgiven of almost $10,000,000, approximately the amount of the operator delinquencies, so that pension payments to the Fund's beneficiaries could continue without interruption (70a, 154a); that the Union's close involvement with the Fund's affairs stemming in part from the fact that two of the three Fund Trustees were until 1967 Union officials, was found by the District Court to have worked to the Fund's benefit and no way to its harm (154a); that the Fund Trustees' initial action in not pursuing a vigorous litigation policy to collect operator delinquencies was found to be a reasonable response to the difficult circumstances which they encountered incident to the Anthracite industry's collapse (121a-122a, 131a-136a); that the Fund Trustees' policies were adopted in good faith (136a); that while the Trustees were deemed negligent in waiting too long before assuming

a more vigorous litigation policy, neither they nor the Union had committed an intentional breach of trust in this regard (139a-148a, 154a); and, perhaps most important, that the Trustees were not union agents and that there was no factual basis for imputing liability to the Union for their conduct (147a, 158a). Specifically, contrary to Respondents' characterization, the District Court refused to hold that the Union and the Fund Trustees had withheld vigorous enforcement action because such action might result in working miners losing their jobs (114a-117a), and explicitly noted evidence that the Trustees were motivated in part by a desire to preserve the current level of Fund royalty income.

While Petitioner can well understand Respondents' reasons for wishing to obscure the dire circumstances in which the operator delinquencies arose and the Union's unstintingly generous response to those circumstances, the District Court's findings in these respects were not rejected as "clearly erroneous" by the Court of Appeals and necessarily govern this Court's approach to the case.

Reasons For Granting The Writ

As set forth in the Petition, the Third Circuit's decision, in conflict with numerous decisions by other Courts of Appeals as well as by this Court, purported to open the way for establishment of a Federal common law of pension and welfare trust fund administration adjudicable under Sections 301 and 302 of the Labor-Management Relations Act, 29 U.S.C. 185 and 186, and, contrary to this Court's decision in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), extended the duty of fair representation to Respondent-retirees even though they are not employees within a union-represented bargaining unit (Petition Parts I and II). Additionally, as set forth

in the Petition, the Third Circuit's decision disposed of threshhold issues bearing on the Union's liability under the various Federal claims and its entitlement to credit for unpaid loans to the Anthracite Fund contrary to the decisions of other Courts of Appeals and this Court (Petition, Part III).

Despite the Third Circuit's acknowledgment of conflict (19a), the Respondents understandably seek to downplay the Court of Appeals' holding and minimize its significance. They seek to portray the holdings as merely an affirmation of pendent jurisdiction and attempt to ignore the Court of Appeals' more extravagant jurisdictional theories as mere *dicta* and matters of detail. They suggest that the decision lacks prospective significance in view of the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, which for the future extends federal jurisdiction and substantive standards to matters of pension fund fiduciary breach. None of these contentions will withstand even cursory analysis.

I. RESPONDENTS ADMIT THAT A CIRCUIT CONFLICT EXISTS AND TACITLY CONCEDE THAT THE DECISION BELOW COLLIDES WITH PREVIOUS DECISIONS OF THIS COURT.

While Respondents seek to downplay its significance, they do admit at least grudgingly the existence of circuit conflict:

> "It is true that all of the observations of the various Courts of Appeals regarding the meaning and scope of LMRA § 301 and § 302 are not entirely harmonious, and in view of the nature of those sections and the complexity of the problems with which they deal, it would be surprising were the situation otherwise." (Respondents' Br., pp. 10-11).

While acknowledging that they "found themselves in a jurisdictional thicket" (Respondents' Br., p. 14), Respondents are not similarly candid in addressing the questions of conflict with this Court's decisions regarding the scope of federal jurisdiction under Section 302(e) and that of the federal statutory duty of fair representation. They seek to distinguish *Arroyo* v. *United States*, 359 U.S. 419 (1959) (see *infra*, pp. 8-9), but do not attempt to reconcile the Third Court's declaration of an implied damage action with the preclusive effect of *Arroyo's* holding that defalcating trustees were not to be held accountable under federal law except by way of the injunctive remedy provided in Section 302(e), 359 U.S. at 427. Similarly they make no attempt to reconcile the Court of Appeals' extension of the duty of fair representation to non-employees outside the bargaining unit with the many decisions of this Court which limit the duty to unit employees, cf. *Emporium Capwell Co.* v. *Western Addition Comm. Org.*, 420 U.S. 50 (1975). While Respondents attempt to distinguish *Pittsburgh Plate Glass*, that decision's holding that retirees are not bargaining unit employees—coupled with this Court's decisions addressing the scope of the duty of fair representation—absolutely forecloses federal jurisdiction of their fair representation claim.

Respondents' express admissions of circuit conflict and tacit concessions of conflict with this Court's decisions amply justify the granting of certiorari review.

II. RESPONDENTS' EFFORTS TO MINIMIZE THE EFFECT OF THE CIRCUIT CONFLICT AND TO OBSCURE THE CLASH WITH THIS COURT'S DECISIONS ARE UNAVAILING.

A. The Third Circuit's expansion of federal jurisdiction under Sections 301 and 302 of LMRA and the duty of fair representation is unprecedented and cannot be ignored as simply establishing a predicate for pendent state claims.

Even if the Third Circuit's holding were really "carefully restricted" to a finding of pendent jurisdiction as Respondents seek to portray it (Respondents' Br., pp. 1, 5), it would nevertheless call for this Court's review. As set forth in the Petition, no substantial claim is made under Section 301 absent assertion of a contract breach (Petition pp. 32-38). Nor can a substantial duty of fair representation claim be made by Plaintiffs who are not "employees", 29 U.S.C. 152(2), within a union-represented bargaining unit. (Petition 38-46). To the same effect, no substantial claim of federal jurisdiction is made under Section 302 where the only ostensible structural violation had been corrected prior to the assertion of jurisdiction thereunder and the relief sought was limited to a claim for damages, rather than for injunctive relief, to prevent or correct a Section 302 violation, the sole remedy provided by Section 302(e) (Petition, pp. 20-32). Even a genuinely narrow holding that Respondents' jurisdictional theories were sufficiently substantial to support pendent jurisdiction, would be so contrary to prior decisions by this Court and other Courts of Appeals as to demand this Court's review.

In this case, however, a cursory reading of the Third Circuit's decision confirms that it is not by any means restricted to a finding of pendent jurisdiction. The Third Circuit was hardly restricting itself to a finding of pendent jurisdiction when it discoursed at considerable length regarding the extension of Section 301 to a suit alleging tortious interference with contractual rights and fiduciary breach in the administration of a pension fund; indeed, the Court of Appeals specifically disagreed with the District Court's conclusion that jurisdiction under Section 301 was lacking (8a-12a). Equally outside the bounds of a narrow holding on pendent jurisdiction was the Court's detailed elaboration declaring the existence of an implied federal damage action under Section 302(e) (21a-29a), a position which Respondents themselves did not advocate below and have not sought to defend here.

Similarly, the Court of Appeals was not restricting itself to pendent jurisdiction when it declared that the federal statutory duty of fair representation extends to "minorities inside *and outside* the bargaining unit." (Emphasis added.) (15a). Respondents' contention that the Court of Appeals restricted itself to a finding of pendent jurisdiction would be far more persuasive had the Court proceeded to hold federal jurisdiction lacking despite the declared substantiality of the claims. It did not do so.[1]

In this case, the Court of Appeals' escapade with federal jurisdictional theory is so unfounded that it would amply justify this Court's review even were it genuinely only a predicate for a finding of pendent juris-

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[1] The repeated protestations by the court below, euphemistically characterizing Respondents' federal claims as sufficiently substantial to support federal jurisdiction belie its own understanding of the tenuousness of the federal theories and awareness of the lack of decisional support therefor. At any rate, however, the Third Circuit let slip the veil in its discussion of the merits by declaring that the Union could be held liable, not merely under state law, but *as a matter of federal law* under the same fiduciary standards which would obtain under the state law of trusts (36a).

diction. Any fair reading of the Court of Appeals' decision in this case confirms, however, that contrary to the Respondents' characterization, it declares new bases both for federal jurisdiction and for imposition of liability.

B. The conflict between the decision below and the decisions of this Court and various Courts of Appeals is not confined to *dicta*.

Just as the Court of Appeals' holding cannot be minimized as merely a finding that the federal claims were not substantial, its observations regarding the scope of federal jurisdiction in connection with this litigation cannot be discounted as mere *dicta*. Nor can the disparities with other decisions be minimized in significance as mere matters of detail as Respondents seek to do (Respondents Br., pp. 8-13). As set forth in the Petition, the Third Circuit in this case has purported to open the way for development, under the auspices of the Labor-Management Relations Act, of a federal common law of pension and welfare trust fund administration. It has done so wholly without guidance and authorization by this Court. Its invocation of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), in this regard, is supported only by law review articles by isolated commentators (9a) and is contrary to the decisions of several other Courts of Appeals including the First, Second, Fifth, Sixth, Seventh, and Eighth Circuits (Petition pp. 18-19), as well as to this Court's decision in *Arroyo* v. *United States*, 359 U.S. 419 (1959). Respondents attempt to distinguish *Arroyo* as precluding merely *criminal* liability for embezzlement from a Section 302(c)(5) fund. Such a reading is contrary both to the plain language of *Arroyo* and to the reading given *Arroyo* by the Fifth Circuit in *Snider* v. *All State Administrators, Inc.*, 481 F. 2d 387 (C.A. 5,

1973), *cert. denied*, 415 U.S. 957,[2] and to the views of several Courts of Appeals to the effect that Section 302 does not authorize a civil damage remedy (Petition, pp. 27-30). The Third Circuit's decision in this regard is in irreconcilable conflict with this Court's decision in *Arroyo* and with the views stated by at least five other Courts of Appeals.

By the same token, the Third Circuit's declaration that Section 301 jurisdiction extends beyond breach of contract to claims sounding in tort and asserting fiduciary breach conflicts with numerous decisions of other Courts of Appeals as set forth in the Petition (Petition, pp. 32-38). Here too, Respondents' strategy in this Court is apparently to disassociate themselves from the more untenable aspects of the Court of Appeals' decision. That this is so is plain from a comparison of the views stated by the Court of Appeals regarding the

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[2] Respondents attempt, contrary to the Third Circuit's acknowledgment of conflict, to harmonize *Snider* with the decision below on the grounds that the *Snider* court, though affirming the trial Court's refusal to exercise pendent jurisdiction in that case, stated that pendent jurisdiction could have been exercised (Respondents' Br., pp. 11-12). While allegation of a currently-existing structural violation of Section 302 could have justified exercise of pendent jurisdiction in *Snider*, the refusal to exercise such jurisdiction should *a fortiori* have been affirmed in this case where the only ostensible structural violation had been corrected before any assertion of jurisdiction under Section 302(e) was made. *Snider*, as the Court of Appeals recognized, held Section 302 jurisdiction strictly limited by the terms of Section 302(e). The Court of Appeals' holding here that Section 302(e) jurisdiction could be successfully—or even substantially—invoked by way of a damage claim asserting a structural violation which had ceased to exist is manifestly in conflict with *Snider* as well as the decisions of several other circuits as set forth in Petition.

scope of Section 301 jurisdiction (6a-12a) with Respondents' statements in their Brief that they "do not assert that § 301(a) establishes subject matter jurisdiction over claims for improper administration of union trust funds" and that it is "suits for violation of collective bargaining agreements with which § 301(a) is concerned. . . ." (Respondents' Brief, p. 13). That Respondents themselves disavow the Court of Appeals' untenable jurisdictional theory could not be more clear. Respondents' argument with respect to Section 301 proceeds with a *non sequitur* to the effect that "in the instant action there is no question that there was pervasive violation *by the operators* of the provisions of the collective bargaining agreement." (Emphasis added) (Respondents Br., p. 13). Contract violations by the operators would undoubtedly support jurisdiction of a derivative action by the pensioners against the operators for collection of the royalties, *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1963). However, as the Third Circuit held in its earlier decision, *Nedd* v. *United Mine Workers of America*, 400 F. 2d 103 (C.A. 3, 1968) and reaffirmed in the present decision (7a, fn. 7), the operators' violations do not support jurisdiction of a Section 301 claim against the union.

Along the same line, the Court of Appeals' declaration that the duty of fair representation can extend to persons outside the bargaining unit whose benefits are not even mandatory subjects of collective bargaining is in inevitable conflict with this Court's decision in *Pittsburgh Plate Glass*. That decision makes perfectly plain that the duty is not owed to persons outside the bargaining unit and does not arise as a consequence of voluntary industry practices acceding to negotiation over such persons' benefits as permissive bargaining subjects. Again, the Respondents do not even purport to defend the Court of Appeals' reliance on *Railroad*

Trainmen v. *Howard*, 343 U.S. 768 (1952) nor to rebut the discussion of that case in the Petition (Petition, pp. 41-42). Their assertions that the duty necessarily arises where permissive bargaining occurs is contrary to this Court's clear explanation that the consequence of such bargaining is *contractual* protection for the specific rights conferred on extra-unit individuals by way of permissive bargaining (Petition, p. 45 & fn. 27). Similarly, Respondents are simply wrong in their assertion that the "duty 'to balance the interests of all its constituents' is precisely what [a union's] duty of fair representation is all about" (Respondents Br., p. 9). Unions remain free under the federal labor laws to make their own rules for admission and maintenance of membership, 29 U.S.C. 158(b)(1)(A), and may choose to admit to membership all manner of persons who do not happen to be employed within a union-represented bargaining unit. The statutory duty of fair representation, however, arises only as a result of the union's exclusive representative status and extends to persons employed within such units whether or not they happen to be union "constituents".

Finally, as set forth in the Petition (Petition, pp. 46-49) and not even addressed by Respondents, the Third Circuit's disposition of threshhold issues bearing on the union's liability under the various federal theories and its entitlement to credit for loans to the Fund is contrary to decisions of this Court and of other Courts of Appeals. Manifestly, Respondents could not address this portion of the Petition and still maintain their strategy of contending that the Third Circuit's holding was solely addressed to pendent jurisdiction. Nor could they address this portion of the Petition consistent with their overall strategy of seeking to obscure the immense benefits accruing to the Fund by way of its close relationship with the UMWA through the

nearly $10 million dollars of loans advanced so that pension payments could continue without interruption.

C. Rather than diminishing the prospective impact of the decision below, the enactment of ERISA underscores the urgency of granting review to restrict judicial development of federal common law standards for pension trust administration which could potentially conflict with federal statutory and administrative standards.

Respondents are plainly incorrect in suggesting that the Court of Appeals' decision lacks significance in view of the enactment of ERISA. The Court of Appeals' decision is rife with implications both within and without the area of pension fund regulation. Within the pension area, the Third Circuit's decision adds a third body of substantive law to the pre-emptive federal standards prospectively applicable under ERISA and to what had otherwise been recognized as the state fiduciary standards applicable to pre-ERISA cases. The Court of Appeals' decision—unnecessarily and confusingly—interjects a compound body of substantive law not deriving decisively from either state or federal standards (26a & fn. 31). Such a result would be undesirable even if the decision's implications were confined to the area of pension regulation which they obviously are not. The Court of Appeals' purported recognition of Section 301 jurisdiction over claims asserting tortious interference with contractual relations—rather than breach of contract—promises to open the federal courts to a wide variety of suits having nothing to do with pension regulation which had not hitherto been subject to Section 301 jurisdiction. The same is true of the Court of Appeals' declaration of an implied damage remedy under Section 302(e). It is perhaps most plainly true of the Court of Appeals' purported extension of the duty of fair representation to persons who are not "employees" in the sense of the Act, 29

U.S.C. 152, and not situated within a union-represented bargaining unit.

CONCLUSION

For the reasons stated in the Petition and herein, review of the Court of Appeals' decision should be granted and the decision below reversed.

Respectfully submitted,

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